

DECISIONS

OF THE

COURT OF SESSION,

From November 1787 to July 1792.

COLLECTED BY

WILLIAM STEUART, and ROBERT CRAIGIE, Esqrs,
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

EDINBURGH:

PRINTED FOR BELL & BRADFUTE,

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WILLIAM STEWART & CO. CRAGGIE, Edin.



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LATELY PUBLISHED,
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DECISIONS
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COURT OF SESSION,

From November 1792 to July 1793.

(Being the First Number of a New Volume.)

COLLECTED BY
ROBERT DAVIDSON and DAVID DOUGLAS, Esqrs,
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

Next Month, will be Published,
NUMBER SECOND,
Collected by the same Gentlemen.

DECISIONS

OF THE

COURT OF SESSION.

N^o I.

November 15. 1787.

JOHN HAY BALFOUR, and others,

AGAINST

Miss HENRIETTA SCOTT.

FOREIGN.—*An heir is not bound to collate heritage in Scotland by succeeding to executry-funds of the predecessor in England.*

COLLATION.—*Heirs, whether alioqui fucceffuri, or not, and whether ab intestato, or provifione hominis, must collate, in order to claim any fhare of the moveable fucceffion.*

MR SCOTT of Scotstarvet executed a settlement, by which he difpofed his estate “to himfelf in liferent, and to David, his eldeft fon, &c. in fee; whom failing, to his “fecond fon, John, &c.; whom failing, to his own other “heirs and affignees whomfoever; *the eldeft heir-female excluding heirs-portigners, and fucceeding without divifion*, through the whole courfe “of fucceffion in all time coming.” And a provifo was fubjoined, that the feveral male heirs, and the husbands of the female heirs, were to bear the name and arms of the difponer’s family.

A charter, with infeftment, having followed on this difpofition, David Scott poffeffed the estate till his death under that title. His property then, befides this landed estate, confifted of government-fecurities to a large amount, of fome other moveable effects fituated in
A England,

England, and of certain personal funds in Scotland. He having no heirs of his body, his succession devolved to Miss Scott, and other daughters of his brother, and to Mr Hay Balfour, and the other issue of a sister.

Miss Scott, by virtue of the clause recited above, became sole heiress; her sisters, Mr Hay, and the rest, being executors. As such Miss Scott likewise claimed a share of the whole moveable succession; upon which Mr Hay, and others of the executors, instituted a process, "for having it found and declared, that in consequence of asserting her title to the moveables, whether English or Scotch, she was bound to collate the heritage."

The English and Scotch executry, as being governed by different rules, fell to be distinguished in the argument.

With respect to the *English* executry, the defender

Pleaded: It is now a point so much fixed as to admit no farther discussion, That succession in moveables ought to be regulated by the *lex loci rei sitæ*; Fac. Coll. 13th January 1778, Davidson *contra* Elcher-son; *cod. die*, Henderson *contra* Maclean; 19th January 1785, Morris *contra* Wright. The law of collation being unknown in England, the defender became intitled to her share of the executry situated there, without incurring that obligation. It is a right thus absolutely acquired that the pursuers are seeking to wrest from her; and the ground of their claim is singular. Because the law of England has, in their opinion, given too much, the law of Scotland ought to correct this injustice, by forfeiting the defender of a part of her property under its power. By parity of reason, the property of every one may be seized in like manner, who has effects in England, or in any foreign country. There is another point of view, in which this absurdity is glaring. The right of claiming, on collation, a share of executry, is a benefit indulged to heirs. Had it not existed, such a demand could not possibly have been made on the defender. Now, why should her situation be rendered worse by the mere existence of the privilege?

Answered: The rule of our law, that an heir who takes a part of the succession as one of the next of kin, must collate the heritage, being founded on the principle of equality, its application is evidently the same, whether such succession has opened in this country or in any other. And accordingly, in a similar case, it is established, that children who claim legitim are obliged to collate whatever they have already received from their father, notwithstanding that it may have consisted of debts or effects situated in England or elsewhere.

That rule ought to determine the present action, the subject of it being land-property in Scotland, though the cause from which it has arisen be the defender's taking a share of a personal estate in England. For land-property is ever to be governed by the laws of the country where it is situated. Thus, suppose the landed estate in question to be in England, and that the defender had claimed it after obtaining her share of the Scotch moveables, it is plain, that the English law would have

have kept to its own maxims, and disregarded the Scotch plea of collation; in the same manner as the law of Scotland is here to be adhered to by admitting collation. Or, suppose a wife to accept from her husband a special provision of subjects situated in England, or any foreign country, that surely, whatever contrary law might prevail in such country, would as effectually preclude her legal claim of terce in this, as if the subject of her provision had been locally here.

“ The Lords found, That the succession to David Scott of Scotstarvet his personal estate in England, falls to be regulated by the law of England; and therefore, so far as respects it, assails the defender from the process of declarator.”

With respect to the *Scotch* executry, it was

Pleaded: The obligation to collate does not properly extend to collateral heirs, who are never deemed *alioqui successuri*. The end and the essential principle of collation is, that a perfect equality among the successors may be effected; Voet, ad tit. 6. lib. 37. digest. § 27. Wherever this is impracticable, as the reason of collation ceases, the thing itself ought likewise to cease. In the direct line of those *alioqui successuri*, the law has destined an exact distribution; so that, whatever advanced payments have been made to any of them, must be imparted to the common funds; whereas, in the collateral line, an heir who should collate might not perhaps draw a tenth part of what some of the other collaterals may have already received by advancement from the predecessor, of which they could not be required to communicate any share. Thus collation appears inapplicable to collateral heirs. The decision, however, in the case of Chancellor *contra* Chancellor, 2d December 1742, Kilkerran, *voce* Collation, may seem to contradict this reasoning; but as it refers only to heirs *ab intestato*, it still cannot affect the defender, taking her succession *provisione hominis*. For, as is now to be shewn on other principles, the obligation to collate can never reach to heirs by destination.

Our law will not bestow upon an heir, in prejudice of other next of kin, both heritage and moveables. In order to obtain a share of the latter, he must restore the former. But he who acquires heritage by the deed of the predecessor receives nothing from the law, and so has nothing to restore. Hence, when he claims his part of the executry, there can be no room for the demand of collation, agreeably to the following authorities; Balfour, *voce* Heirs and Successors; Stair, b. 3. tit. 8. § 48.; Mackenzie, b. 3. tit. 9. § 11.; Bankton, vol. 2. p. 385.; Erskine, p. 600. *in fine*.; and more especially, Kames's Rem. Decif. 19th November 1720, Ricart *contra* Ricarts. Now the defender is called to the succession by the disposition of her grandfather and of her uncle, it having been framed by the one, and preserved in force by the other; a settlement which lays her under restraints that may be regarded as the price of the grant.

Were it even admitted, that a settlement on an heir *ab intestato* may be held as intended to save the making up of titles, without any purpose

pose of departing from the legal order, (an admission not very consistent with the decision, Cathcart *contra* Rocheid, 16th February 1773, Wallace), it would not affect the present case. The defender and her two sisters were all three jointly the heir *ab intestato*. The unity of the right was essential to it; so that it was annihilated as soon as any separation was made by disinheritance. She therefore could not be heir *ab intestato*, even as to a third share; and as to two thirds, it will not be supposed; besides, that she may be deemed a purchaser with regard to the whole.

Answered: It was perhaps never before maintained, that collateral heirs were invested with a privilege above all others; inasmuch that while they may claim a share of the moveables along with the other nearest of kin, they are alone exempted from the equitable condition of collating the heritage; Fountainhall, 7th June 1707, Chiefly *contra* Chieflies; Bankton, b. 3. tit. 8. § 28.; Erskine, b. 3. tit. 9. § 3.; Kilkerran, *voce* Collation, Chancellor *contra* Chancellor, 2d December 1742.

Nor is there any ground for the argument, that the obligation to collate being confined to heirs *ab intestato*, affects not the defender, who succeeds in virtue of a special destination. In fact, as to a third part of the estate she is clearly heir *ab intestato*; and her being likewise called by a deed concurring with and enforcing the legal course of succession, can make no essential difference in the case. Fathers often execute dispositions of their lands in favour of their eldest sons; and eldest sons take up estates as heirs under the provisions of marriage-contracts. These are more simple or more easy modes of completing titles; but were never thought to create to the heir any additional claim to the moveable succession; Bankton, vol. 2. p. 385. § 28.; Stair, 23d July 1678, Murray *contra* Murray.

Considered as heir *provisione hominis*, the defender is equally bound to collate. Whether succession devolves in the one way or in the other, the distinction between the heritable and the moveable branches continues invariable. Any one of the nearest of kin being likewise executor by testament, is equally excluded from the heritage, and equally intitled to relief from the heritable debts, as if he had succeeded *ab intestato*. In the same manner, persons succeeding to heritage as heirs of provision, are obliged to relieve the executor from heritable debts, and have a title to be relieved by him from moveable debts, as much as those who succeed *ab intestato*. In short, heirs of provision, whether with respect to privileges, as those of apparenay, reduction *ex capite lecti*, the *annus deliberandi*, and the like; or with respect to the regulations made against them for the security of creditors, and obviating their frauds, stand exactly on the same footing as heirs *ab intestato*; Bankton, b. 3. tit. 8. § 100.—Accordingly the decision in the case of Ricarts, quoted on the other side, is not applicable to the present question. The parties there were heirs-portioners, and as such equally vested with the character both of heirs and of executors, of which character the special destination in favour of one of them was not understood to divest her; whereas the present defender is heir, while the pursuers are exclusively the executors.

The

The Lords found, that the “defender Miss Scott was not intitled
“to claim any part of the executry of her uncle David Scott of Scotts-
“tarvet in Scotland, without collating his heritable estate, to which
“she succeeds as heir.”

Reporter, Lord Justice-Clerk.

Act. Dean of Faculty, Rolland, Blair.

Alt. Lord Advocate, Solicitor-General, MacLaurin, Ross, Honyman, J. Anstruther junior.
Clerk, Robertson.

S.

N^o II.

November 15. 1787.

The YOUNGER CHILDREN of LAUHLAN MACTAVISH,

AGAINST

His CREDITORS.

PROVISIONS TO HEIRS AND CHILDREN,—*When understood to create a proper jus crediti.*

BY the marriage-contract between Lauchlan Maclavish and his wife, his landed estate was destined “to the heir-male of the marriage; whom failing, to the heir-male to be procreated by Mr Maclavish in any subsequent marriage; whom failing, to the heir-female of the marriage; the eldest heir-female always succeeding without division; with a power to Mr Maclavish, if he thought fit, to prefer any of the younger sons of the marriage to the elder; or in case of no heir-male existing, to prefer any of the younger daughters of the marriage to her eldest sister.”

The following clause was then added: “And moreover, the said
“Lauchlan Maclavish binds him, his heirs and successors, to make
“payment to the children to be procreate of this marriage, other than
“the heir who shall enjoy the lands, the respective sums in the events
“after mentioned, viz. 1st, If an heir male or female of this marriage
“shall succeed, and survive majority, there shall be paid to the younger
“children, whether sons or daughters, if one, the sum of L. 1000; if
“two, the sum of L. 1200; if three or more younger children, the
“sum of L. 1500. 2^{dly}, If there be no heir-male of the marriage
“surviving at the dissolution thereof, or if there be an heir or heirs
“male of the marriage who shall die without lawful issue, and the
“estate devolve on the heir-male of another marriage, in that event
“there shall be paid to the daughters of this marriage, if one, the sum
“of L. 1200; if two, the sum of L. 1500; and if three or more, the
“sum of L. 2000; the whole of the said provisions to be divided
B “among

“ among the children intitled thereto in the events foresaid, by such proportions as the said Lauchlan Maclavish shall appoint by any writing under his hand; and failing such division, equally amongst them.”

By another clause, the above-mentioned sums were declared to be payable to the respective children, upon their marriage or attaining the age of majority; Mr Maclavish becoming bound to maintain them until one or other of these terms should arrive.

Mr Maclavish's affairs having gone into disorder, a claim was, during his life, entered by his younger children, for the sums which had been provided to them. And in support of this claim, which was opposed by his creditors, it was

Pleaded: Although bonds of provision, not exigible till the father's death, are in general held to be of the nature of rights of succession, which do not enable the children to maintain a competition with his onerous creditors, the case is different where they have been so framed as to afford a proper ground of action during his lifetime. And it is not necessary for this purpose, that the term of payment should be such as must unavoidably precede the father's death. It is enough if this is merely possible. In the present case, where the payment is to be made on the childrens majority or marriage, and where the father is in the mean time obliged to provide a suitable maintenance to them, there seems to be no doubt of the complete efficacy of their right. It is true, that the sums provided to them are, in certain events, enlarged or diminished. But this at the utmost could only have the effect of limiting their *jus crediti* to the smallest of these sums: and although the father has been authorised to distribute the whole in such proportions as he thinks fit, this ought not to have any influence; because he cannot thereby, in any shape, narrow the obligation he has come under, or oblige the whole children to accept of a less sum than has been provided to them. This point, indeed, appears to have been precisely determined, 31st January 1759, Henderson's Children *contra* his Creditors.

Answered: The marriage-articles, in the present case, have been so conceived, that the children cannot, previously to their father's death, insist for the sums provided to them. Not only is it in his power, at any time during his life, to select out of all the children, male or female, respectively, the person who is to be his heir, male or female, in the lands, and in this manner to exclude the child so named from any part of the stipulated sums; but it is only after the heir male or female has actually succeeded, a circumstance which cannot occur while the father is alive, that the provisions are exigible. And the same consequence must follow, from the uncertainty in the extent of the sums due in the different events which have been specified, as well as from the power which is given to the father, of determining at any time what proportion of those sums shall be paid to each child. As to the decision in 1759, it is a single one, contrary to the general tenor of former determinations, and unsupported by any after practice.

tice. And what seems sufficiently to distinguish it from the present case, the provisions were declared to be due on the *existence* of an heir-male who *shall* succeed: so that the Court might consider these words as implying a condition of an heir-male *existing*, not of his actually *succeeding*: An interpretation which is here altogether inadmissible.

Some of the Judges, moved by the determination in the case of Henderson's children, were inclined to admit the pursuers claim; but the majority considering that case as erroneously decided,

"The Lords found, That the children of Lauchlan MacTavish, claiming under their father's marriage-contract, cannot compete with his onerous creditors."

A petition, reclaiming against this judgement, was refused without answers.

Reporter, Lord Braxfield.
Clerk, Sinclair.

Act. Dean of Faculty, Rolland.

Alt. M. Ross.

C.

N^o III.

November 15. 1787.

ROBERT WILLIAMSON,

AGAINST

ROBERT LUNAN.

TEIND.—*The vicarage of lint due, if in use to be paid out of the farm.*

THE lands of Lethindy-bank had formerly been the uncultivated part of a large farm, from which they were afterwards disjoined and brought under tillage. They were then granted in lease to Robert Lunan; and Mr Williamson, the parish minister, having been in use to levy, in the parish, the vicarage-tithe, particularly that of lint, claimed the ordinary proportion of this article raised on these lands.

Robert Lunan objected to this, and

Pleaded: Vicarage-tithes are only due from such particular farms, and out of such articles as have been rendered subject to that burden by immemorial and inveterate usage. In the present case then, the vicarage

vicarage of lint cannot be due ; because, till very lately, the farm possessed by the defender never was in a situation to produce any thing but grass.

Answered: The right of levying vicarage-tithes is no doubt entirely consuetudinary ; and if it could be alledged, that none had been levied out of certain lands, or even that with regard to some articles the tenants of a certain farm had been uniformly exempted, a valid exception would thence arise, although by far the greatest part of the parish had been liable to this burden in its fullest extent. But where, throughout a whole parish, the vicarage-tithe has been uniformly levied out of every article raised on the lands, it cannot be thought, that because a small part of the farms, from the method of cultivation formerly used in it, has been incapable of producing one particular species of fruit, out of which a tithe of this sort is due, it is therefore to be altogether exempted.

“ The Lords unanimously repelled the defences, and found expences “ due.”

Ordinary, Lord Alva.

A&. D. Williamson.

Alt. Hagart.

Clerk, Colquhoun.
C.

N^o IV.

November 17. 1787.

DAVID, ANDREW, and WILLIAM ARCHIBALDS,

AG A I N S T

MARION MARSHALL.

WRIT. Act 1579, c. 80. 1681, c. 5.—*A witness being designed in a deed by a familiar appellation, and subscribing in his proper one, vacates the deed.*

JOHN ARCHIBALD executed a deed, whereby he gave to Marion Marshall his wife, the liferent of a small tenement of land, yielding only L. 3, 13 s. a-year.

After John Archibald's death, his widow, in virtue of the above-mentioned settlement, possessed the tenement for several years ; when, at last, it was objected to as informal, by David, Andrew, and William Archibalds, the brothers of the deceased, on this ground, that although one of the witnesses had, in the testing clause, been designed *Thomas Hillock* weaver in Alloa, the name of the witness actually subscribing was *Thomas Hill*.

Mrs Marshall, the widow, offered to prove, that the person thus designed and subscribing was the same ; that in his youth he had been

been commonly called *Hillock*, and had for some time adhibited his subscription in that manner; but that afterwards he had been accustomed to subscribe by the name of *Hill*. Several writings also were produced, to which he was either a party or a witness, where he had been designed *Thomas Hillock* alias *Hill*. And it was

Pleaded: The deed in question cannot be thought to fall under the enactment of 1579, because the parties and witnesses subscribing "have been denominated by their special dwelling-houses, and other evident tokens." The only objection, then, that can arise, is in consequence of the subsequent statute in 1681, by which indeed it is provided, that "only subscribing witnesses shall be probative, and not witnesses, not insert, subscribing; and that all writings in which the witnesses subscribing are not designed shall be null." Although, however, this last statute has been so rigidly enforced, as not to admit of the clearest evidence, not appearing from the face of the deed, that a person not mentioned in the body of it did actually subscribe as a witness; yet a different rule ought to be observed in a case like the present, where the person subscribing is actually, though somewhat inaccurately, designed, and where the only difference between the testing clause and the subscription is, that in the former the witness has been mentioned under a familiar appellation instead of a more proper one. If, as in the other deeds which the witness had occasion to subscribe, the words "*alias Hill*" had been added, no doubt could have arisen as to the validity of the deed; and surely the omission of these words cannot be deemed fatal to it.

Answered: The words of the act 1681, requiring that the witnesses subscribing should be those previously designed, are clearly applicable to the present case: for Thomas Hillock, who is designed, has not subscribed, and Thomas Hill, the witness subscribing, has not been designed. As to the proof here offered, it must be equally inadmissible, as it was found to be in a variety of former cases. Nor indeed could any latitude of this sort be permitted, without at once taking away the effect of an enactment, which, from the increasing number of forgeries, becomes every day more necessary.

The Lords, after advising minutes of debate, "sustained the objection." A petition was afterwards presented for Mrs Marshall, the widow, but it was refused.

Reporter, *Lord Braxfield*.
Clerk, *Sinclair*.

A&S. *Geo. Wallace*.

Alt. *A. Abercromby*.

C.

N^o V.

November 20. 1787.

ROBERT CARMICHAEL, and others,

A G A I N S T

Sir JAMES COLQUHOUN.

PART AND PERTINENT.—*The right of trout-fishing understood as conveyed under the description of part and pertinent, but may be expressly reserved from the grant, or transferred to a third party.*

THE title-deeds of Sir James Colquhoun's estate bear his right "to the fishing of salmon, and other fishings, in the water of "Leven."

Mr Carmichael, and other proprietors of the grounds lying along the banks of the river, and who are all infest in their lands, either "cum piscationibus," or with "parts and pertinents," instituted an action of declarator against Sir James; in which they set forth, "That they and their authors had, by virtue of their titles to the lands, been in the immemorial practice of catching trouts with nets and rods in the river *ex adverso* of their respective properties;" and concluded, that they had a right so to fish, or "in such other manner as to them might seem proper; and that he ought to be prohibited from the exercise of trout-fishings *ex adverso* of their lands."

Pleaded for the defender: Trout-fishings are not more *res nullius*, or less capable of appropriation, than salmon-fishings, which, from their superior value, have been ranked *inter regalia*; Craig, lib. 1. dieg. 16. § 11.; Erskine, b. 2. tit. 3. § 69. The defender's title-deeds shew that he is vested with the property of those in question.

Answered: The defender's exclusive right to salmon-fishing is admitted. But long before the Crown conferred that right, the pursuers authors had acquired their lands, and the trout-fishing as pertinent of these: for in no instance was the fishing of trout ever reserved by the Crown. It could not, then, bestow that right on the defender. Nor is the vague expression of "other fishings" sufficient to indicate such an intention.

The Court seemed unanimous in the opinion, that the right of trout-fishing in a river, though naturally inherent in the property of the adjacent banks, so as to accompany lands as part and pertinent, might yet be reserved from the grant, or transferred to a third party,
either

either expressly or by prescription; and that trouts were *res nullius* in this sense only, that any person standing on a high-road, or other public ground contiguous to the stream, might lawfully catch them.

Some of the Judges thought the clause "other fishings" in the defender's charters sufficiently expressive of the exclusive right of fishing trout on the banks in question; which others did not admit; but all seemed agreed, that if he or his authors had that exclusive right, it had been lost by disuse.

The cause was reported upon informations; when the Lords pronounced this interlocutor:

"In respect that Sir James Colquhoun's right to the salmon-fishing is not disputed in this cause, find he has right to the salmon-fishing in the river Leven, where it runs through the property of the pursuers: Find the pursuers have a right to fish trouts opposite to their respective properties, with trout-rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the salmon-fishing belonging to Sir James Colquhoun, the defender."

Reporter, Lord Braxfield.
Alt. Solicitor-General, et Baillie.

Act. Dean of Faculty, et Mortbland.
Clerk, Home.

3.

N^o VI.

November 28. 1787.

DOUGLAS, HERON, and COMPANY,

AGAINST

Mrs HELEN CLERK.

WRIT. Act 1681.—*An error in the Christian name of a subscribing witness, otherwise properly designed in the deed, and in such a manner as sufficiently to distinguish him, held a nullity under the statute.*

IN a process of ranking of creditors, it was objected to a bond produced for the interest of Mrs Clerk, that it bore to be signed in presence of a witness there designed "Thomas Wars, servant to Thomas Nicolson vintner in Edinburgh;" whereas the name of the witness subscribing was "Francis Wars." And in support of the objection, it was

Pleaded:

Pleaded: The statute of 1681, cap. 5. expressly requires that witnesses be designed; and declares, that if this be omitted, the writings are null; and that the defect cannot be afterwards supplied by *condescendence*. Here the subscribing witness mentioned is not even named in the deed; which therefore is null: A conclusion sanctioned by a decision in a case precisely similar, *Abercromby contra Innes*, 15th July 1707, Dalrymple; in which it was successfully argued, "that it was more safe for the lieges, and just for the Lords, to walk by the rule of the express words of the act of parliament, than to break in upon it, and thereby introduce the supplying or rectifying of other greater mistakes." The same principle governed more lately the analogous case of the Creditors of *Graham contra Grierison*, 26th December 1752.

Answered: *Si constet de persona*, as in the present case, where the designation excludes the possibility of doubt, both the spirit of the statute, and the construction given to it by the Court, combine to exclude the nullity in question. The inference from the scope of the enactment is self-evident, and the interpretation of the Court is exemplified in the case of *Beattie contra Lambie*; Fountainhall, 26th December 1695.

The Lord Ordinary found, "that Mrs Clerk could have no place in the ranking, in respect that the bond upon which her interest is founded was not executed in terms of law."

To this interlocutor, on advising a reclaiming petition and answers, the Lords adhered.

Lord Ordinary, *Swinton*.
Clerk, *Home*.

A^d. *Abercromby*.

Alt. *Solicitor-General*.

S.

N^o VII.

November 28. 1787.

JAMES DREW M'CRAW,

AGAINST

MARY and ANNE M'CAWS.

HEIR AND EXECUTOR.—COLLATION.—*An heir cannot insist for collation, if he be not at the same time one of the nearest in kin.*

AFTER the death of David M'Caw, his *heritage*, consisting of a small house, descended to James-Drew M'Caw, his nephew by a brother deceased; while his *executry*, or moveable estate, which was of

of much greater value, devolved to Mary and Anne M'Caws, his sisters and nearest in kin.

James-Drew M'Caw, the heir, insisted in an action for having it found, that he was intitled, upon collating the heritage, to draw a rateable proportion of the whole effects which had belonged to the deceased. In support of this action, he

Pleaded: The right of collation is inseparable from the character of heir. Whenever the person on whom, as the *persona predilecta*, our law has conferred the right of succeeding to the heritage, finds it more advantageous to claim a share of the moveable effects, he is at liberty to do so. This is the opinion of Mr Erskine; and it seems to have met with the approbation of the Court, in a case collected by Lord Fountainhall; although there, on account of specialties, the right of the heir was held to be barred. Other lawyers of eminence, it is true, have adopted a different sentiment. But this apparent inconsistency may be easily removed, by confining the doctrine last stated to another case of collation, occurring between children laying claim to the legitim, which stands on a footing altogether different from that of which we are now speaking; the legitim being due to descendants, and those in the first degree only, and the right to collate, as applicable to it, suffering a corresponding limitation; Erskine, b. 3. tit. 9. § 3.; Fountainhall, 6th July 1698, Dick of Grange *contra* Dicks.

Answered: It has been established in Scotland, as well as in other countries in which the feudal system prevails, that where there are two or more in the same degree of propinquity to a person deceased, the landed property, or those effects which are held to be of an analogous nature, descend in succession to men in preference to women; and to the eldest among the males in exclusion of the younger male relations. In order, likewise, that this privilege may not, in any instance, prove hurtful to the person in whose favour it was introduced, it has been farther established, that he may renounce the exclusive character of heir, and, betaking himself to the common one of nearest in kin, receive an equal proportion of the whole funds. But for intitling any person to the benefit of this alternative, it is not enough that he is called to the succession as heir. He must also, on renouncing this succession, be in such a situation as enables him to lay claim, as executor, or nearest in kin, to a share of the moveable effects which belonged to the ancestor. This is laid down by all our lawyers, Mr Erskine alone excepted, who rather delivers what he says in the way of doubt than as his fixed opinion. The decision observed by Lord Fountainhall does not support the contrary argument. The question which here occurs, was indeed agitated; but, as on the opening of the succession, the heir, who was also one of the nearest in kin, had been required to collate, it was most justly found, that whether such a privilege existed or not, his son, afterwards succeeding, could not lay claim to it; Balfour's Practices, *voce* Heir and Executor, p. 233.;
D
Stair,

Stair, b. 3. tit. 8. § 26. 43.; Bankton, b. 2. tit. 3. § 48. 16th July 1678, Murray.

The Lords, “unanimously assailed the defenders, and found the pursuer liable in expences.”

Reporter, Lord Henderland.
Clerk, Orme.

A& Geo. Fergusson.

Alt. Lord Advocate:

C.

N° VIII.

November 28. 1787.

JOHN SCOTT,

AGAINST

JAMES LESLIE.

FOREIGN.—*An assignee under an English commission of bankruptcy, by obtaining decree in absence against a debtor of the bankrupt, divests him of the jus crediti, and renders every posterior arrestment ineffectual.*

A Commission of bankrupt having been issued against Andrew Mitchell merchant in London, Mr Scott was appointed assignee to the estate. Having learned that one Ferguson, residing in Scotland, was debtor to Mitchell, Scott, in the character of assignee, demanded payment of the debt, of which he immediately received a part, and upon naming an attorney, raised an action for the remainder. After the summons was executed, some farther partial payments were made; and at length decree for the balance was obtained in absence. But before the decree was extracted, Leslie, as a creditor of Mitchell's, raised a process of constitution, and upon the dependence used arrestments in the hands of Ferguson, who then called all the parties in a process of multiple-poining; in which it was

Pleaded for Leslie: By the judgement of the Court in the case of Thomson and Tabor *contra* Forrest, 5th March 1767, it was indeed found, “That assignees under a commission of bankruptcy had a sufficient title to compare and compete in the action;” but it was likewise found, “That the proceedings under the commission of bankruptcy did not bar the creditors of the bankrupts, whether their debts were contracted in England or Scotland, from affecting, by legal diligence, their debtor's effects situated in Scotland.” Though Mr Scott had thus a title to appear and compete, the proceedings which

which have taken place at his instance are not to be deemed equivalent to an arrestment and decret of forthcoming. That, in effect, would be to extend the bankrupt-laws of England to this country, in direct contradiction to the above-mentioned judgement. An Englishman may have effects in Scotland without having any creditors there; in which case there can be no harm in allowing the assignee to carry off the effects; nor in any case would action of repetition lie against him, or against the debtors, were payment to be *bona fide* made; or such assignee may raise processes of constitution against the bankrupt in Scotland, and may arrest or adjudge, in order more effectually to compete with Scotch creditors; but it would be to supersede the common law of Scotland, to hold an action for payment at his instance as equivalent to the diligence of that law.

In no case is a mere decree for payment considered as equal to legal diligence, or as a ground of preference, where a subject is *in medio*. Thus, during the *six months*, "no executor can warrantably pay even to a creditor who has obtained decree, if before actual payment, while the subject is yet *in medio*, another creditor shall interpel him by citation;" Erskine, b. 3. tit. 9. § 43. Or suppose a decree to follow on English letters of administration, it is clear that would be ineffectual against an executor-creditor who had completed his right by confirmation. In such a case as the present, a decree cannot in its nature mean any thing else, than that it is given for ought yet seen; but if any other competitor steps in while the subject is *in medio*, a competition must ensue; the merits of which can only be determined according to the rules of preference which are known and established in the law of Scotland.

That the English assignment gives a *jus ad rem*, or personal claim to the effect of suing for recovery, may be admitted to be the result of the decision in the case of Thomson and Tabor. But that the property becomes transferred the moment that an interlocutor in absence has been obtained in such a process, is a position neither founded in principle, nor supported by authority; for nothing can transfer property from a debtor to a creditor, but either a special conveyance duly completed, or effectual legal diligence.

Answered: If, as has been now admitted, the English assignment gives a *jus ad rem*, or claim to the effect of suing for recovery, it must evidently follow, that when the *jus ad rem* so given, or in other words, the transference of the *jus crediti* under the assignment, was by the decree in question sustained as effectual, and at the same time in the strongest manner intimated to the debtor, the bankrupt being thereby completely denuded, nothing was left to be attached by the competing party. Nor is the decree in this view held as equivalent to a decret of forthcoming; its operation being, not to produce a preference on the effects of Ferguson in competition with his other creditors, but to complete the transference of the *jus crediti* which was in the bankrupt. Thus, the instance given, of a decree against an executor not affording any preference on the effects of the defunct, appears foreign to the purpose, since it cannot shew that such a decree in favour of an assignee would

would not have divested the cedent. Of as little consequence is it, that a decree following on English letters of administration would not confer a preference over a creditor confirming, any more than a decree on a Scotch licence to pursue. In that case the decree could not be extracted without confirmation, which is necessary to take the effects out of the *hereditas jacens* of the defunct. With respect to the supposed necessity of arrestment and forthcoming, for vesting the right under the assignment; that diligence, it is plain, could only have proceeded on the footing of the right to the debt remaining in the bankrupt, which is absurd, seeing it has been transferred to the assignee.

The Lord Ordinary preferred Mr Scott, the assignee under the commission of bankruptcy.

Mr Leslie reclaimed to the Court against this interlocutor, and his petition was followed with answers; after which, a hearing in presence was appointed. And,

“ Having resumed the consideration of the petition, with the answers, and having heard parties procurators thereon, the Lords adhered to the interlocutor of the Lord Ordinary.”

A petition reclaiming against this judgement having been advised, with answers, was refused.

Lord Ordinary, *Esqgrove*.
Alt. Lord Advocate, *Macleod-Bannatyne*.

For Mr Scott, *Blair, Maconochie*.
Clerk, *Home*.

S.

N^o IX.

December 6. 1787.

THOMAS WIGHTMAN,

AGAINST

DAVID GRAHAM.

VIS ET METUS.—BILL OF EXCHANGE. *Exception of violence arising from legal concussion, good against the onerous indorsee of a bill of exchange.*

ROBERT BURGESS paid a sum of money which was due by his father, and afterwards obtained from David Graham, the creditor, an assignation of the debt with warrandice from fact and deed.

He

He immediately took out a caption in virtue of the clause of registration annexed to the assignment, and thus, by the terror of imprisonment, compelled the assigner to grant a bill of exchange, in which the sums originally due were accumulated with the interest and the expence of diligence.

For setting aside this bill, a process of reduction was brought; and in absence of the defender, the common interlocutor was obtained, finding it null and void, until it was produced. But a few days after, Robert Burges indorsed it, for value, to Thomas Wightman, who, in an action for payment against David Graham,

Pleaded: No exception is competent against the onerous indorsee of a bill of exchange, which does not appear from the writing itself. And hence it has been found with regard to bank-notes, on account of their similarity to bills of exchange, that the exception of theft, which, in general, is productive of a *labes realis*, cannot be pleaded against a *bona fide* holder. In the present case, however, there does not seem to be a sufficient degree of violence to afford a relevant defence even against an ordinary assignee. Imprisonment, without the order of law, is, doubtless, a sufficient ground of reduction; and in the same manner, any arrest of the person will be sufficient to annul an obligation which has no connection with that on which such detention has followed. But here the grounds of the diligence were *ex facie* just, and the imprisonment was followed out in the ordinary way. As to the proceedings in the action of reduction, these cannot be thought to be of any consequence: the certification in this action, when it does not contain a warrant for improbation, being only, that the writings called for shall be of no effect, until they are produced in judgement; Erskine, b. 3. tit. 2. § 31.; Bankton, b. 1. tit. 13. § 15. 24th February 1749, Hugh Crawford *contra* The Royal Bank; Voet. ad tit. *Quod metus causa*, N^o 10.; Stair, b. 1. tit. 9. § 8. b. 4. tit. 40. § 26. 27.; Dictionary, *voc. Vis et metus*; Erskine, b. 4. tit. 1. § 24.

Answered: The privilege of current bills is not disputed. But in every action founded on a written document, it is necessary that the obligation of which it is the voucher, shall not be destitute of those qualities that are essential to every agreement. If it has been impenetrated by force or fear, the shape in which it has been framed cannot be of any importance. This reasoning, indeed, is peculiarly applicable to the present case. For as it arises from the implied will of the acceptor of a bill of exchange, that those defences which would otherwise be competent are not available against an onerous indorsee, this being a necessary consequence of subscribing a writing of this sort; so, where the subscription has not been the result of his free will, but extorted by violence, there is no ground on which an obligation so unlimited can receive any support. So accordingly, it was expressly found, 26th November 1776, Willocks *contra* Callender and Wilson. The circumstance of a decret of reduction having been obtained before the indorsation, is a strong confirmation of the general argument. For, if by the mere execution of a summons, or by its being called in

Court, the right becomes litigious and incapable of alienation, surely, when a decret has been obtained, finding the right itself to be void and null, the same consequence must unavoidably follow.

The Lord Ordinary gave judgement against the defender.

But after advising a reclaiming petition and answers, the Court being of opinion, that a writing impetrated like the one in question was of no validity,

“ The Lords sustained the defences, and affoizied.”

Lord Ordinary, *Hailat.*
Clerk, *Menzies.*

A^d. Geo. Fergusson.

Alt. Corbet.

C.

N^o X.

December 7. 1787.

DAVID CLARK,

AGAINST

ALEXANDER JOHNSTON and the PROCURATOR-FISCAL of
MID-LOTHIAN.

PRISONER. ALIMENT.—Act 1696. *How far a person imprisoned for non-payment of a fine to the private party and to the public prosecutor, is intitled to the benefit of the act of grace.*

THE justices of the peace of the county of Mid-Lothian, before whom a prosecution had been brought by Johnston against Clark, for an assault and battery, “ fined and amerced Clark in L. 6 Sterling; L. 3 whereof to be paid to Johnston, and the other L. 3, (after “ deduction of expences), to the procurator-fiscal; and ordained the “ defender to find caution to keep the peace for one year, under the “ penalty of 200 merks Scots.” Having failed to pay and perform what this sentence ordained, Clark was incarcerated in the prison of Canongate; and soon after, he applied for the benefit of the act 1696.

The magistrates having “ found the prisoner intitled to no aliment,” he presented a bill of advocacy; in which it was stated, that a fine or damages, though resulting *ex delicto*, were nevertheless a *civil* debt, and the imprisonment in question, it being *for that cause*, such as by the express terms of the statute intitled the complainer to the benefit claimed. To this plea was opposed the judgement of the Court in the case of Macleslie, 23d November 1738, where it was found, that all damages arising *ex delicto*, were comprehended under the exception

ception of the statute respecting "prisoners for criminal causes," whom it declares "to be in the same state as formerly."

The Lord Ordinary on the bills reported the bill and answers to the Court, who were unanimously of opinion, that the precedent in the case of Macleslie ought to be departed from; and that damages, though *ex delicto*, awarded to a private party, were, in the sense of the statute, "a civil cause of imprisonment."

Some, though not a majority of the Judges, thought that the fine decreed to the procurator-fiscal was to be viewed in the same light. As to "the caution for keeping the peace," there was no doubt entertained of the borough being bound to aliment the prisoner while confined on that account.

In consequence of the opinion of the Court, the Lord Ordinary pronounced this interlocutor: "Refuses the bill; but remits to the Bailies of Canongate, with these instructions: *1mo*, That they find, that if the private party detains the complainer in prison for payment of the *three pounds* awarded to him, he must aliment him in prison while he is so detained: *2do*, With respect to the *forty shillings* of expences, that they find, that if the procurator-fiscal shall detain Clark in prison for payment of that sum, he shall be obliged to aliment him in prison while he is so confined: And, *3tio*, With respect to the *one pound* of fine, independent of the expences foregoing, that the procurator-fiscal shall be at liberty to detain the complainer in prison till that sum be paid, without being obliged himself to pay him aliment while so detained."

Reporter, Lord Alva.

Att. Solicitor-General.

Alt. J. Anstruther junior.

C.

Nº XL.

December 11. 1787.

ROBERT TAILZEUR,

AGAINST

ELISABETH-JEAN TAILZEUR.

DEATHBED. Proof of reconvalence.—*Being in a market-place, tho' only for the purpose of visiting a friend, found sufficient.*

THE lands of Barrowfield, having been formerly destined to heirs-male, would have descended, after the death of the late proprietor, to Robert Tailzeur, his uncle, to the exclusion of Elisabeth-Jean Tailzeur,

Tailzeour, his sister. On 9th April 1782, however, Mrs Tailzeour was called to the succession by a deed of settlement; for setting aside which, a process of reduction, on the head of deathbed, was brought.

It appeared from the proof, that in February 1782, the deceased had been seized with a consumptive disorder; and that, in the following month, he went to Edinburgh to take the advice of physicians; who gave it as their opinion, that he would not survive long; and on 22d April he died, only thirteen days after the date of the settlement.

On the other hand, it was proved, that as the settlement was most rational, by preventing the exclusion of a sister, with whom the deceased had always lived on the most friendly terms; so to the hour of his death the testator had been in the full possession of his faculties; that a very few days after the execution of the settlement, he had gone to the town of Montrose, to dine with his sister, and on that occasion alighted from his carriage without help; and that, after standing some time in the streets, and conversing with some of his acquaintance, he went into his sister's house, which is in the market-place. And this happened during market-hours.—The pursuer

Pleaded: Were the law of deathbed founded on a presumption merely, that every mortal disease was accompanied with such a deprivation of reason, as disqualifies a person from the right administration of his affairs, it might be obviated by evidence, either arising from the settlement itself, or from extraneous circumstances. This, however, would be quite inconsistent with the object of the regulation, which was introduced for the humane purpose of preserving the peace of dying persons, and for preventing settlements which had been made or approved of by the party while in full health from being set aside, at a period when it was at least a possible case, that owing to the imperceptible decay of the mind, which so often corresponds with that of the body, the deceased had been influenced by such considerations as at any other time would have had no weight with him. Thus, though it should appear that a settlement made on deathbed was highly reasonable, and although no circumstances could be alledged from which either an improper influence on the part of the person called to the succession, or an ill-grounded resentment against the heir at law, could be discovered, still the deed, as executed by one under a legal disability, must be ineffectual.

As, therefore, it has been proved, that the deceased, before making out the deed in question, had contracted that illness which was the occasion of his death, the only thing to be considered is, whether any proper evidence of convalescence has been established, so as to bring his case under one or other of the exceptions that have been made to the general law. That he did not, by surviving the sixty days, remove the legal challenge, agreeably to the statute of 1696, c. 4. must be admitted. It seems equally clear, that the other requisites of his going to kirk or market have not been complied with. It is true, that posterior to the date of the settlement, the deceased was in the market-

ket-place, and on a market-day ; but this alone never can be thought to answer the purpose of the law, which was, not only that testators should be brought into a situation where their conduct might be observed by impartial witnesses, but that, in the course of the proceedings which usually take place there, an opportunity might be given of examining the real state of their minds. Such an opportunity could not be afforded by the testator's having merely appeared in a market-place in the way of travel, or, as in the present case, for the purpose of visiting a friend.

Answered: In order to a proof of legal reconvalence, by the testator's being at a market, it is only necessary that he should be in the market-place, during market-hours, unsupported. It is no more required that he should buy or sell while there, than that, in the case of his going to church, he should preach. Indeed the circumstance of his not attending minutely to the observance of the ordinary formalities ought to go a considerable length in support of the deed. For, if the mere going to kirk or market, when performed for the sole purpose of giving effect to a settlement, is to be held sufficient, though it must afford the clearest indication of the testator's declining health, it would be unreasonable that the same event should not be attended with the like effect, when, so far from going to either of those places with a view of excluding the legal challenge, it appears that none of the parties imagined this to be necessary. This reasoning has been confirmed by several decisions. In that of the Earl of Roseberry *contra* his Sisters, 29th July 1736, the deceased had come to Edinburgh from his country-seat, and afterwards went to the cross, between the hours of twelve and one in the forenoon : and although it was objected, that the cross was not a market-place, the objection was overruled.

The Lords, not unanimously, "sustained the defences."

Reporter, Lord Ankerville.
Alt. Lord Advocate, Abercromby.

Act. Wight, Maclaurin.
Clerk, Menzies.

C.

N^o XII.

December 11. 1787.

ALEXANDER BLACK,

AGAINST

DAVID BLACK.

DEATHBED.—*Not necessary to constitute deathbed, that the illness should before the date of the settlement be so violent as to confine the party to his bed, or even to his house.*

AN action was brought by Alexander Black, for setting aside a deed of settlement in favour of David Black, as having been executed while the granter was on deathbed.

It was proved, that for several years the testator had laboured under a severe cough, attended with a difficulty of breathing; that before executing the settlement, he had become considerably weaker; and that he died thirty-five days after; but that he had never been confined to his bed, or even to his house, nor prevented by his illness from going about his ordinary business, his faculties till the last remaining in full vigour.

Pleaded in defence: The law of deathbed, which originally resulted from feudal principles, and was afterwards continued from a distrust of the Popish clergy, who often exercised their influence on dying persons, to the disinheriting of the legal heirs, ought now to be confined within very narrow bounds. But even while its operation was most extensive, the settlement in question could not be thought to fall under it. It is true, that the deceased did not outlive the sixty days, and that he was not either at kirk or market. These circumstances, however, are not indispensably necessary to validate a settlement, but only to prove, in those cases where the testator had been formerly ill, that he had been restored to such a situation as sufficiently qualified him for making a distribution of his effects. But here there is no occasion for any proof of convalescence; because it does not appear, that before making the settlement the testator laboured under such a distemper as could subject his actings to any legal objection. He was neither *sick* nor on *deathbed*, but continued, for a month after, to conduct his affairs in his ordinary way, and with his usual propriety. If it were sufficient to constitute deathbed, that the most trifling indication of decay had appeared, there would be no end to disputes of this sort.

Answered:

Answered: Though the causes from which the law of deathbed was at first introduced may not now exist, the regulation itself is not the less binding; nor has it yet ceased to be of the utmost use in preserving the rights of the lawful heirs, and the quiet of dying persons. To admit the argument offered on the part of the defender, were to set it aside altogether. It is not necessary for supporting a challenge on the head of deathbed, that the distemper under which the testator at the time laboured should be a *morbus fonticus*, or the certain cause of immediate death. All that is required is, that at the time of making the settlement he shall have been subject to that particular illness which terminated in his death: A circumstance fully established in the present case, where the disorder being of the consumptive sort, its ordinary symptoms had appeared, and grew more and more distressing as his dissolution approached.

“ The Lords repelled the defences.”

Lord Ordinary, *Ankerville.*
Alt. *Maconochie, Abercromby.*

A&S. *Dean of Faculty, Hagart.*
Clerk, *Colquhoun.*

C.

N^o XIII.

January 14. 1788.

JOHN BALFOUR,

AGAINST

PATRICK MONCRIEFF.

WARRANTICE. PERSONAL and REAL.—*Real warrantice, how far effectual against singular successors, if it be not specified in the warrantor's investment.*

THE late Mr Balfour Ramsay was proprietor of the lands of Demperstone in fee-simple, while his wife, Mrs Anna Ramsay, held those of Whitehill under a strict entail, in favour of the heirs-male of her body, bearing the name and arms of Ramsay.

In order to preserve the representation of the two families, it was agreed, that Mr Balfour Ramsay should convey the lands of Demperstone to his second son, under an obligation to exchange them with his elder brother for the lands of Whitehill. These last the second son was to hold under the limitations of the entail.

The proposed exchange was effected soon after Mr Balfour Ramsay's death. The nature of the transaction was distinctly set forth in the disposition of the lands of Demperstone, in favour of Mr John Balfour,

Balfour, the eldest son. But in the charter under the great seal which followed, it was only stated in general terms, and in the instrument of feisin it was not at all mentioned.

Mr Balfour afterwards sold the lands of Demperstone to Mr Moncrieff, who refused to pay the price, on this ground chiefly, that if any of the sons of Mr Balfour, who were the proper heirs of entail in the lands of Whitehill, should at any time enter their claim, Mr Balfour's younger brother and his heirs might have recourse, in virtue of the real warrandice, against the lands of Demperstone. Mr Balfour, on the other hand, contended, that as the circumstances of the exchange did not appear from his infestment, those who purchased from him were perfectly secure. He

Pleaded: Nothing can affect a singular successor in landed property, which is not accurately pointed out in the records. Even where, from a registered feisin, it appears, that some limitation or incumbrance was intended, and where its nature and extent is precisely specified in the charter or other warrant for taking infestment, this is not enough, if it do not enter the infestment itself. The case of real warrandice is not an exception from the general rule. It has indeed been said, by some of our lawyers, to be effectual even against singular successors, if the nature of the bargain has been mentioned in the *deed*: but by this must be understood, such a writing or document as is inserted in a proper record for publication, or in other words, in the register of feisins, into which alone purchasers are obliged to look for discovering incumbrances on land. Without this, the boasted security of our records would prove a snare to those who relied on them; Bankton, b. 1. tit. 19. § 4.; Erskine, b. 2. tit. 3. § 51.; Dictionary, vol. 2. p. 70. 71.; Forbes, 17th July 1706, Campbell *contra* The Creditors of Park; Fountainhall, 27th November 1711, Lady Monboddo *contra* Haliburton.

Answered: It is true, that in consequence of various enactments respecting different deeds which are used for the transmission or burdening of landed property, no incumbrance can now be imposed on it by the agreement of parties, which may not be discovered on a proper search of the public registers. But there are many incumbrances, which, as they arise from the operation of the law, and without any positive agreement, must still be enforced in the same way as if these enactments had never been made. Thus, the rights of courtesy and terce, and in the same manner, the legal reversion of adjudications, although the two former do not appear from the infestment of the husband and wife, and although the last cannot, in general, be discovered from the adjudger's feisin, must ever be effectual against the lands. A right of real warrandice is precisely in the same situation. If the circumstances of the exchange appear in the disposition or other deed of conveyance, the party warranted has, by the act of the law itself, the same preference, in case of eviction, over every one laying claim to the lands originally belonging to him, as if the infestment in his person had never suffered any alteration; Erskine, b. 2. tit. 3. § 28.

A precise determination of the general question was here unnecessary, it being sufficient for Mr Moncrieff the purchaser's argument, to show, that the right given to him was of such a questionable nature as justified his refusal to pay the price. But the case was thought by the Court to be attended with considerable difficulty; and it was only upon Mr Balfour's younger brother's agreeing to concur in the conveyance in favour of Mr Moncrieff, and thereby renouncing his claim of recourse, that, in a suspension of a charge for the price,

"The Lords found the letters orderly proceeded."

Reporter, Lord Alva.
Clerk, Sinclair.

Act. Rolland.

Alt. Blair.

C.

N^o XIV.

January 16. 1788.

GEORGE PICKERING,

· A G A I N S T

SMITH, WRIGHT, and GRAY.

RIGHT IN SECURITY. BANKRUPT.—Act 1696. *An heritable bond granted in security of sums to be paid on a cash-account, ineffectual, except as to payments made prior to the infestment.*

JAMES KING granted to Smith, Wright, and Gray, bankers, an heritable bond for L. 2500; on which infestment was taken. They, on the other hand, by a separate deed, acknowledged "that they had not then paid the above sum; but that the bond was intended as a security for such payments as they already had made, or should *thereafter* make, during the currency of a cash-account which they had opened in his favour."

King accordingly received from time to time considerable sums; but having afterwards become bankrupt, and disposed his estate to Pickering, as trustee for his creditors, the latter instituted an action for reducing this heritable security; and

Pleaded: By the statute of 1696, cap. 5. it is enacted, for the prevention of fraud, "That any disposition, or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the seisin or infestment following on such disposition or right." The security in question having been evidently granted

granted for a debt to be contracted "for the future," if it ever was to exist at all, comes directly under the words of the law: so that it is needless, while the expression is thus unequivocal and clear, to inquire, whether future debts, altogether indefinite, may have been more especially the object of the statute. Though in these the danger of fraud might be greater than in definite debts, the language of the enactment proves, that it was apprehended to exist in both. Accordingly the Court having applied the statute to indefinite debts, in the case of Macdowall *contra* Rutherford, 19th January 1715, Bruce, applied it equally to such as were future, though definite, in that of Kinloch *contra* Dempster, 13th June 1750, Kames.

Answered: Prior to the statute, it was usual to give infestments in security of all debts to be contracted, and of all cautionary obligations to be incurred in future. By means of these, not only personal but real creditors, whose rights were posterior to those infestments, could be postponed at pleasure: A practice of a fraudulent tendency, and as such mentioned by Lord Stair, in a passage, (b. 2. tit. 3. § 37.), where the case of the creditors of Langton is referred to as an example, and which is thought to have given occasion to the act of parliament quoted. But the present security, on the contrary, was made for repayment of a specific debt, being the balance of a cash-account, not exceeding L. 2500; the onerous cause for granting which security existed from the time when the defenders agreed to pay so much money. If the records were inspected, the estate would appear burdened to that amount; but it is difficult to conceive how creditors could be thus ensnared, or how any loss could ever result from the discovery that in fact the burden was of no less extent.

Replied: The mere promise to advance money is of no significance, as it could not afford ground for an action of damages.

Observed on the Bench: So salutary an enactment ought not to be narrowed in its construction. Far from introducing any innovation, it does no more than confirm the doctrine of our Feudal law. The loan of the money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non-existence, according as the money, during the currency of the cash-account, should have been paid, repaid, and paid again; the creditor being of course the vassal one day, the next not so, the third a second time vassal, and so forth.

The Lords sustained the reasons of reduction of the heritable bond, so far as respected the sums advanced posterior to the date of the feisin thereon.

Reporter, Lord Stonefield.
Clerk, Home.

A&S. Dean of Faculty.

Alt. Blair.

S.

N° XV.

N^o XV.

January 16. 1788.

HUGH FINLAY,

A G A I N S T

BERTRAM, GARDNER, and COMPANY.

BANKRUPT. Act 1783.—*The production of an interest in the action against a poinder, equivalent to "summoning" by the party producing.*

FINLAY having poinded the effects of his debtor, who became bankrupt, in terms of the statute of 1696; and another creditor, in virtue of the late bankrupt-statute, having raised an action against the poinder, Bertram, Gardner, and Company appeared in that action, producing their interest, and craving to be conjoined. To this it was objected by Finlay, That the permission of the statute to other creditors to claim their proportions of the goods poinded, is qualified by this express proviso, "that they make their claim by summoning the poinder:" whereas, here was no summons, but merely an appearance in an action already instituted.

The Court were unanimously of opinion, that the judicial demand made by the production of the interest in question, was a stronger step, in bar of the limitation "of four months," than the mere summoning of the poinder, which, as the simplest mode, was allowed for the convenience of the creditors claiming; and it was observed, that the same interpretation had been given to the act of federunt of 1662, by holding production of an *interest* as equivalent to *citation*, the expression which is employed in that act.

"The Lords, therefore, repelled the objection."

Reporter, Lord Dreghorn, Probationer.
Clerk, Home.

For Finlay, M^r Cormick.

Alt. Tail.

S.

N^o XVI.

N° XVI.

January 19. 1788.

MARY COWAN, and ANDREW COWAN her Father, Petitioners.

JURISDICTION.—Nobile officium. *In the appointment of a factor loco tutoris, the strictest attention required to the established regulations.*

THE husband of Mary Cowan died possessed of property, both heritable and moveable, leaving several infant children by her, but without having made any settlement of his effects, or nomination of tutors or curators to his children. Along with her father, she presented a petition to the Court, stating these circumstances, and adding, that the tutor-of-law was, by reason of infirmity, incapable of discharging that office; and therefore praying, that she might be appointed *factor loco tutoris* to the children during her widowity. On advising the petition, it was

Observed on the Bench: The granting of factories *loco tutoris*, is in itself a stretch of the powers of the Court, and in every instance ought to be strictly guarded by the established rules. In the present case, as the application is only made in the names of the mother of the children, and of her father, intimation ought to be given under form of instrument to the two nearest agnates, not because their consent is deemed essential, but in order that they may have an opportunity of stating any relevant objection to the proceeding.

The Court having unanimously acquiesced in this opinion,

The above-mentioned intimation was accordingly ordered.

For the petitioner, *Dickson.*

S.

N° XVII.

N^o XVII.

January 22. 1788.

PATRICK ALISON,

A G A I N S T

MARGARET PROUDFOOT and ADAM LITSTER.

TACK.—*Lands let for nineteen years, not to be sublet, without a special authority from the landlord.*

PATRICK ALISON let part of the lands of Newhall, for nineteen years, to James Wilson, “ secluding his heirs, executors, administrators, and assignees, except in the event of his wife’s surviving him, in that case he shall have power to assign to her what years of the tack shall be then to run.”

James Wilson assigned the lease to Margaret Proudfoot his wife, who immediately after his death sublet the lands to Adam Litster. An action was brought by Mr Alison, the landlord, for setting aside this sublease, when it was

Pleaded in defence: The contract of location is not in its own nature personal or intransmissible. In the Roman law, even with respect to lands, a lessee might transfer his right to another, provided the lessor could suggest no relevant objection to his character or circumstances. L. 1. C. *Locati*.

It is true, that in very ancient times this agreement was, by the construction of our courts of law, put on a different footing. This, however, entirely arose from circumstances of a temporary nature; from the rudeness of the age, landlords then relying more on the fidelity of their tenants and retainers than on the protection of the laws; from the municipal regulations of the country, which rendered proprietors of land responsible for the conduct of those who resided on their estates; and also from the nature of the prestations then exigible from tenants, which, consisting almost entirely of personal services, brought them nearer the state of menial servants, than that of a modern farmer. Hence it was, that a lease, during these periods, was considered as a contract *stricti juris*. If given to a woman, it fell by her subsequent marriage. If to a man, it became void by his death. It was alike incapable of voluntary or of judicial transmissiion.

But for more than a century past, this contract being ever wisely enforced by our judges, in conformity to the sense of the country, has regained much of its original nature. It is no longer the personal services of the tenant, or his peculiar qualifications, (leases of

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land

land being frequently exposed to public roup), but the rent in money which he can afford to pay, which a landlord has in view. Hence the heirs of a tenant are now uniformly admitted, unless particularly excluded. His creditors, in the same manner, if they will undertake to pay the rent, may, in virtue of legal diligence, enter into possession of the farms, either by themselves or by their factor. A tack granted to a woman does not fall by her marriage. And it has been expressly found, with regard to a lease for nineteen years, even although assignees had been specially excluded, that the lands might nevertheless be sublet. From that time also, it has become usual for landlords to express in the leases granted by them, the whole restrictions they intend to impose; and thus the presumption in favour of the tenant is, in case of their silence, rendered altogether decisive.

Indeed, what purpose could it now serve, to create, by implication, a prohibition either against assigns or subtenants, when, instead of a landlord's well-grounded expectation of having only for his tenant the person he contracted with, he must, on the demise of the original lessee, admit in their order, all persons who are in the remotest degree related to him, although they be minors, idiots, or irretrievably bankrupt? or why should he have a power of rejecting an industrious assignee or subtenant, when, in case of the tacksmen's bankruptcy, judicial assignees, altogether ignorant of the art, and perhaps, from their poverty, equally destitute of the means of cultivating the farm, must be admitted, unless the lessor has taken care, by a special provision, to exclude them? Balfour, *voce* Affedation; Craig, lib. 2. dieg. 5.; Dict. *voce* Tack, 10th March 1775, Gillon *contra* Muirhead.

Answered: Although some of the reasons which in former times contributed to a limited interpretation of the tenant's right do not now exist, it is still of the utmost importance to landlords, that they shall have a power of rejecting, without assigning any reason, those persons, in the character of assignees or subtenants, with whom they are dissatisfied.

A proprietor of lands is no longer indebted to the faithfulness of his tenant for his personal safety. He is not answerable to the state, or to individuals, for his tenant's conduct in society; but he must ever depend on his tenant's personal industry for the payment of his rents; on his peculiar qualifications as a farmer, especially at a time when farming has become a science, for the right cultivation of his lands; and on his peaceable and neighbourly disposition, not only for his own quiet, but for that of the other tenants on his estate. A thousand instances might be given, where a man, to whose character and circumstances no legal objection could lie, might, as a tenant, bring the greatest inconveniency and loss on his landlord.

The few alterations, some of them perhaps scarcely justifiable, that have occurred in the interpretation of this agreement, do not go so far as has been stated. A lease, where assignees are not excluded, may be carried by adjudication; the favour of creditors making way for this exception from the general rule. From a presumption, that a tenant's representatives, generally the descendants of his body, will inherit

inherit the same dispositions, and follow out the same methods of cultivation, another exception has been introduced in favour of heirs. And it has been once found, in the case of a lease granted to a woman, which did not at any time become forfeited by her marriage, but was merely suspended during the coverture, that the husband, in the wife's right, might continue to possess the lands; this being equally advantageous to the proprietor as to the lessee.

But unless in tacks of such an endurance as brings them almost on a footing with rights of property, all the other restraints are still in force. Without a power of assigning, assignees are excluded: and although in one case, which was attended with peculiar circumstances, it appears to have been found, that an exclusion of assignees did not prevent subsetting, no determination has been since pronounced which has given a sanction to that precedent. With the exception, too, of Mr Erskine, who speaks doubtfully on the subject, all our writers, ancient and modern, have uniformly held, that subleases are not permitted, unless in virtue of a special authority from the landlord, or in consequence of particular circumstances, which do not here occur, Balfour, *voce* Affedation, c. 40.; Dirleton, *voce* Tack; Stair, b. 2. tit. 9. § 22. 26.; Sir George Mackenzie, b. 2. tit. 6. § 8.; Bankton, b. 2. tit. 9. § 15.; Kilkerran, *voce* Tack, N^o 7.

Both parties endeavoured to obtain some confirmation to their several arguments, from the peculiar circumstances of the case. And the determination of the Lord Ordinary, though he also expressed an opinion in favour of the defenders on the general point, was chiefly founded on these. But the final decision of the cause was rested on this principle, That in a lease of no greater endurance than nineteen years, neither assignees nor subtenants were admissible, unless in virtue of a special paction.

The interlocutor of the Lord Ordinary was in these terms:

"Having considered the principal tack libelled on, which sets the farm for nineteen years to James Wilson, secluding his heirs, adjudgers, executors, and assignees, *without mentioning subtenants*, but allows him to assign the tack to his wife, in case she survives him, and which farm she accordingly subset to the defender, Adam Lister, for the remaining years of the tack: therefore sustains the defence," &c.

After advising a reclaiming petition, with answers, a hearing was ordered on the general point; and the Court, by a considerable majority, altered the interlocutor of the Lord Ordinary.

The Lords found, "That Margaret Proudfoot, the defender, had no right to grant the sublease under reduction; and therefore reduced the same."

Lord Ordinary, Justice-Clerk.

Alt. Dean of Faculty, Mackintosh, R^o. Craigie.

Act. Wight, Rolland, Geo. Fergusson, Geo. Robertson.

Clerk, Sinclair.

C.

N^o XVIII.

N^o XVIII.

February 7. 1788.

HUGH GRANT,

AGAINST

The DUKE of GORDON.

PATRONAGE.—*One of the patrons in an united parish, may present on every vacancy, if no presentation be offered by the other patron.*

IN 1726, a vacancy in the united parishes of Moy and Dyke had been supplied in consequence of a presentation from the predecessor of Mr Hugh Grant.

In 1782, on the death of the incumbent, different presentees were offered, by the Duke of Gordon, as having right to the sole patronage; and by Mr Hugh Grant as patron of Moy. And the settlement having been delayed till the question of right should be determined in the civil courts, it was at length found by the Court of Session, that the patronage of Moy belonged to Hugh Grant, and that of Dyke to the Crown.

Still, however, the Duke of Gordon, whose ancestors had been in use of presenting in this parish, insisted, that the patron of Moy having exercised his right on the immediately preceding vacancy, the person named by himself should be preferred; or that at least the right of presentation should be held as devolved, for that time, to the presbytery.

Observed on the Bench: The enactment of 1617, c. 3. provides, that, in the union of two or more parishes, “the presentation of ministers should be appointed by the commissioners of tithes, to pertain to the patrons *alternis vicibus*.” But by this it was not intended to abridge the *rights* of patrons, but merely to regulate the *possession*, in the only way which the nature of the case admitted of. When, therefore, the patron who may present on a particular vacancy does not chuse to exercise his right, that of the other, meeting with no obstruction, must be allowed its fullest influence.

“The Lords preferred the presentee of Mr Hugh Grant.”

Lord Ordinary, Swinton.
Honyman, Tait.

Adv. Blair, Ja. Grant.
Clerk, Sinclair.

Adv. Maclaurin,

C.

N^o XIX.

N^o XIX.

February 13. 1788.

ANDREW BAIRD,

AGAINST

ROBERT AITKEN, and others.

PERICULUM.—*The price of flax-seed found due, though it was insufficient, the purchasers not having complained till after it had been sown.*

ROBERT AITKEN, and others, purchased a quantity of lint-feed, for sowing, from Andrew Baird, who had imported it from Riga. It had been inspected, in the usual manner, by the public officers appointed for that purpose; but in general it turned out extremely ill, and in some instances its insufficiency appeared before it was sown.

An action having been brought for the price, it was

Pleaded in defence: Every merchant is understood to warrant the sufficiency of the goods which he has sold at the ordinary price; and therefore, when these have proved altogether unfit for the uses of the purchaser, he is liable in damages. Surely then, in such a case, he can have no claim for the price. It is true, that with respect to some articles, if they are not returned within a reasonable time, the purchaser will not be allowed to complain; but this rule cannot hold in the case of flax-feed, the goodness of which can only be known with certainty from its growth.

Answered: It is not from the bad quality of the flax-feed, but from the rash and precipitate conduct of the purchasers, that any damage has here arisen. For if it had been duly returned, as, after its insufficiency was observed, it ought to have been, or if, as is commonly practised where there is any doubt, a proper experiment had been made before sowing the whole; the merchant, on receiving it from the purchaser, would have been enabled to return it to the original furnisher, and thus matters would have been brought to the same state as if it had never been imported into this country.

It was also stated for the pursuer, that of all those who had purchased flax-feed from him, the defenders alone had offered to complain; from which he inferred, that the badness of their crops must have been, in a great measure, occasioned by some neglect in their method of cultivation. But the case was decided on the general principle, That the purchasers of articles of this sort were bound to make a proper trial, before they proceeded to sow in any considerable quantity,

tity, so that, if insufficient, the goods might be returned to the feller.

“ The Lords repelled the defences, and found the defenders liable in expences.”

Lord Ordinary, *Elphinstone*.

A&T. *Macintosh*.

Alt. *Hoy*.

Clerk, *Menzies*.

C.

N° XX.

March 6. 1788.

HENRY LINDSAY,

AGAINST

WILLIAM DRYSDALE.

MEMBER OF PARLIAMENT.—Nominal and fictitious.

MR LINDSAY's claim to be inrolled among the freeholders of the county of Fife, as liferent-superior of certain lands, was rejected at the meeting for election in 1787; the freeholders considering the feudal titles exhibited for him as nominal and fictitious.

He afterwards preferred a complaint to the Court of Session. Answers were given in, in the name of Mr Drysdale, one of the freeholders; and Mr Lindsay was required to confess or deny the following particulars:

1st, Whether the right which had been made over to him by his elder brother, the *fiar* of the superiority, and *proprietor* of the lands, was not entirely gratuitous?

2^{dly}, Whether his brother had not defrayed the expence incurred, not only in framing the necessary writings, and in entering the claim in the freeholders court, but also in discussing the legality of it in the Court of Session?

3^{dly}, Whether the feu-duty exigible by the claimant was not 2 s. 6 d. yearly, doubled at the entry of an heir or singular successor?

4^{thly}, Whether the right had not been granted by his brother, and received by him, for the sole purpose of giving him a title to vote, and without any regard to the pecuniary emoluments arising from it?

5^{thly}, Whether, though the claimant had granted no written obligation to renounce his right when it was convenient for his brother, he did not consider himself as bound in honour to do so? And,

6^{thly},

6thly, Whether, though the claimant had not positively promised to exercise his right of voting at the will of his brother, he did not, however, consider himself as obliged to give his vote to the candidate patronised by his brother, in opposition to his own wishes?

To these questions Mr Lindsay gave in answers; in which he admitted the truth of the four first articles. But with regard to the 5th and 6th, he declared, That he considered himself to be under no obligation whatever, express or implied, either to give up his suffrage, or to exercise his right of voting at the will or for the behoof of his brother, any more than if he had acquired the same right by purchase from a stranger. These answers were subscribed by Mr Lindsay, who professed his readiness to undergo a judicial examination on oath, or to enter into any other inquiry, by witnesses or otherwise, which should be thought necessary for a full and accurate discussion of his right. This inquiry, however, Mr Drysdale declined, chusing to rest his argument on the circumstances which were acknowledged as sufficient for his purpose.

As the general arguments on both sides were the same with those used in the questions occurring in 1786-7, on occasion of the election in the county of Renfrew*, it is unnecessary here to repeat them.

By some of the Judges it was thought, that by the proceedings which had been recently held in the Court of Session, and in the House of Lords, they were now at liberty to enter into a full disquisition as to the legality of what are commonly called nominal and fictitious votes, unrestrained by any former decisions. The majority of the Court, however, being of opinion, that the trifling pecuniary value of the right was not by itself a sufficient proof of nominality; and that the other circumstances of the case did not establish the existence of any *latent* or *implied trust* in Mr Lindsay,

The Lords found, That the freeholders had done wrong in refusing to admit Mr Lindsay to the roll.

For the Complainer, *Dean of Faculty, Macleod Bannatyne.*
Clerk, *Orme.*

Alt. Blair, Geo. Fergusson.

C.

* See 20th February 1787, *Macdowall contra Buchanan, &c.*

N° XXI.

June 13. 1788.

JAMES RUSSEL, and others,

A G A I N S T

P A T R I C K F R A S E R.

PRESUMPTION.—Payment of a bill presumed from circumstances, though the sexennial prescription had not elapsed.

FRASER granted a promissory note to Alexander Boog, who lived five years and ten months after its date in 1780, without having made any claim upon it. Action, however, for the payment was raised by Russel, and other trustees of the heir of Boog. The defender stated a variety of circumstances, from which it appeared that the debt was already paid; and

Pleaded: It is true, the period of the sexennial prescription was not fully elapsed; but evidence of payment from circumstances is to be received against every document of debt; Stair, b. 4. tit. 45. § 23.; Bankton, b. 4. tit. 34. § 2. Nor can it make any difference, whether the law has established with respect to such documents a longer or a shorter prescription.

Answered: When there was no other prescription of bills of exchange but that of forty years, presumptions of payment were sometimes received against such as had stood unretired for a long tract of time, though less than the period of prescription. But the statute of 1772 seems to supersede every arbitrary determination in this matter, and to preclude all presumptions of payment, when the document is unretired, and the term of the statute not elapsed. The present, accordingly, is thought to be the first instance in which such an attempt has occurred.

The Lord Ordinary pronounced this interlocutor: “ The Lord Ordinary having considered, &c. is of opinion, that the circumstances
“ founded on by the defender afford a strong degree of probability,
“ that the contents of the promissory note libelled on were paid in the
“ manner condescended on by him: But, in respect of difficulties
“ occurring in the case, he does not think it proper for him, judging
“ singly as an Ordinary, to cut down a clear valid obligation remain-
“ ing in the hands of the creditor, and not of an old standing, upon
“ arguments

June 1788.

COURT OF SESSION.

37

“ arguments and presumptions alone, without legal or direct evidence
“ of its extinction ; and therefore repels the defences.”

But the Court “ altered the interlocutor, and found sufficient pre-
“ sumptive evidence, that the promissory note libelled had been paid
“ or accounted for by the defender to Boog.”

Lord Ordinary, *Eskgrove.*

Ast. Hay.

Alt. M. Ross.

Clerk, Menzies.

S.

N^o XXII.

June 17. 1788.

L O R D M A C L E O D,

A G A I N S T

ALEXANDER ROSS and CHARLES MUNRO.

THIRLAGE.—*No multure can be demanded for grain due to the superior
of the astricted lands, although he shall accept of a sum of money in lieu
of it.*

THE lands of Culrossie, belonging to Alexander Ross, and those of
Allan, the property of Charles Munro, were held feu of the
Crown, for payment of certain quantities of grain, in lieu of which,
for many years, a composition in money had been accepted of. The
whole were thirled, *quoad omnia grana crescentia*, to the mill of Delny,
belonging to Lord Macleod ; and the heaviest rate of multure had been
paid for all the grain raised on the grounds, with the exception of feed
and horse corn only.

At last, an exemption was claimed corresponding to the quantities
of grain exigible by the superior ; and an action being instituted in
the Court of Session, for ascertaining the rights of the parties, Lord
Macleod

Pleaded: The exemption from thirlage that occurs with regard to
grain payable in kind to the superior, is of the same nature with
that respecting feed and horse corn, and liable to the same limita-
tions. Both the one and the other take place, because the grain thus
set apart is necessarily applied to a use incompatible with its being
manufactured by the farmer. Hence, if by any change in the mode
of husbandry, a less quantity of grain comes to be used in maintain-
ing the farm cattle and horses, the possessor of the lands is not at li-
berty to dispose of the surplus without paying the accustomed mul-
tures.

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tures. And in the same manner, if instead of receiving his feu-rents in kind, the superior of the lands shall accept either of meal or of a composition in money, the vassal cannot any longer withdraw a proportional quantity of grain from the thirl. Indeed, in the present case, the uniform practice of paying the heaviest rate of multures for the whole corns, without any exception on account of the feu duties, must be deemed equivalent to an express agreement to this effect; 26th June 1766, Sir William Maxwell.

Answered: There is a material distinction between the exemption from thirlage in the case of seed and horse corn, and that which takes place with respect to grain due in kind to the superior of the ascribed lands. In the former, the exemption does not arise from any positive limitation of the servitude, but because it is impossible to follow out the cultivation of the land without employing some part of the produce for these purposes: but in the latter, the reason obviously is, that a vassal cannot, by any agreement of his, impose a restriction on the right of his superior: and hence, after making a composition with him, he is intitled, as his assignee, to the same privileges. In the case quoted on the other side, admitting it to have been well decided, the circumstances were somewhat different, as the teinds due to the titular, the subject of dispute, were, in consequence of a valuation, payable in meal; 7th January 1709, Halkerston of Rathillet *contra* Melville of Murdocairney.

The Lords at first sustained Lord Macleod's claim. But after advising a reclaiming petition with answers, they altered that judgement, and found, "that the defenders were at liberty, without being liable in any multures, to carry out of the thirl, unmanufactured, a quantity of grain equal to that due by their respective feu-charters to the Crown."

A petition preferred for Lord Macleod was afterwards refused.

Lord Ordinary, *Monboddo*.
Alt. Blair, *Abercromby*.

A&C. Solicitor-General, *Geo. Fergusson*.
Clerk, *Sinclair*.

C.

N^o XXIII.

June 19. 1788.

WILLIAM ALLARDES,

A G A I N S T

JAMES MORISON and ANDREW MURISON.

PENALTY.—*A creditor having prevailed in a challenge of his ground of debt, at the instance of a third party, who was, however, found not liable in expences—intitled to recur against the debtor upon the stipulated penalty for payment of such expences.*

MR ALLARDES lent to William Bogie a sum of money, for which, with annualrent and a liquidated penalty, the latter granted an heritable bond over a subject, in which he stood infest as proprietor, equally with two other persons, James Morison and Andrew Murison; and on the bond infestment followed.

This right was challenged by Morison and Murison, in an action of reduction*; but sustained after considerable litigation; though it was found, that no expences were due by the pursuers.

Allardes afterwards brought a process of adjudication upon the bond, in which Morison and Murison appeared; and making offer to pay the principal sum and annualrents, while they denied that any part of the penalty could be exacted, objected to the passing of the adjudication; and

Pleaded: An adjudication is unnecessary when payment of a debt is offered to the full legal amount. Conventional penalties are only exigible as a recompence for the loss of annualrent, or in order to reimburse the charges of doing diligence for recovery of the debt; but by no means on account of the expences of any action which may take place with respect to it; Fac. Coll. 23d December 1757, Allan *contra* Young and Millar. Wherever such expences are due, it is so found; and thus they are repaid without the aid of the stipulated penalty. In the present case, any demand of expences, under the name of penalty, seems to be even absurd; it having been expressly found, that “expences were not due.”

Answered: The pursuer was intitled to have his heritable bond guaranteed to him; and for this end the expences in question were laid

* See Fac. Col. 8th March 1787.

out. He has therefore the same claim to an adjudication for these as for the expence of executorial diligence, both the one and the other being necessary for rendering his security effectual, and recovering the debt. It is true, Morison and Murison have been found not liable to reimburse the pursuer; but that does not affect the obligation which lies upon Bogie.

The Lord Ordinary reported the cause; when

The Court found, That the pursuer was intitled to an adjudication in security of the penalty in the bond.

Reporter, Lord Hailes.
Clerk, Gordon.

A&T. G. Fergusson.

Alt. C. Hay.

S.

N° XXIV.

June 19. 1788.

The MAGISTRATES and TOWN-COUNCIL of HADDINGTON,

AG A I N S T

The B A K E R S of that T O W N.

THIRLAGE—*of inveſta et illata does not extend to meal or flour imported by the inhabitants, and ground before it is purchaſed.*

THE Magistrates of Haddington, in an action of declarator againſt the bakers of that burgh, maintained, That the town had a right to the thirlage of *inveſta et illata*; and that they were liable for the multure of flour which in that ſtate they had purchaſed out of the thirl, and imported.

The exiſtence of the thirlage was eſtabliſhed by the town's charters, and other documents.—With reſpect to its extent, the defenders

Pleaded: The phraſe “Tholing fire and water,” in the definition of the thirlage in queſtion, is interpreted by “ſteeping and kilning,” in oppoſition to “baking and brewing;” Stair, b. 2. tit. 7. § 20.; Erſkine, b. 2. tit. 9. § 25.; Dict. of Deciſ. *voce* Thirlage. And accordingly, in a caſe ſimilar to the preſent, it was found, 24th January 1749, That the thirlage did not comprehend flour purchaſed when
ground

June 1788.

COURT OF SESSION.

41

ground and then imported within the thirl; Kilk, Falconer, Town of Perth *contra* Raull and others.

Answered: In the words of Lord Bankton: "If meal or ground malt is brought within the thirl, and sold again in kind, it falls not within the thirlage; but does if manufactured into bread or ale; or otherwise it should elude the thirlage, and render it ineffectual; whereas the same extends to what is brewed or baked." B. 4. tit. 7. § 49.

The Court gave judgement agreeably to the decision above mentioned in the case of the town of Perth; and

"Found, That flour-meal and grinded malt bought by the defenders, *after being grinded*, and then imported by them into the burgh of Haddington, was not subject to the thirlage in question."

Lord Ordinary, *Alva.*

A&C. *C. Brown.*

Alt. *M. Ross.*

Clerk, *Sinclair.*

S.

N° XXV.

June 25. 1788.

ELISABETH and MARGARET BRUCE,

AGAINST

JAMES BRUCE.

SUCCESSION—*In moveable effects, regulated by the lex rei sitæ;—in those which are at sea, by the law of the country whither they were destined by the proprietor.*

THE late Mr Bruce of Kinnaird was twice married. Mr James Bruce was the only child of the first marriage. Of the second there existed one son, William Bruce; and two daughters, Elisabeth and Margaret.

William Bruce, at an early period of life, entered into the service of the East-India Company, where he attained the rank of Major in the army. In the course of his service, he acquired about L. 9000, which he for the most part employed in purchasing bills of exchange,
L change,

change, drawn by the Governor-General in India, upon the Directors of the East-India Company in London.

Some of these bills, at the time of his death, were in the hands of his correspondent in London; others were on board a ship, in its way home from India; and he had granted a power of attorney to three of his friends in Scotland, for uplifting the money, and laying it out on such security as should be most for his advantage. As to the remainder of his effects, they were situated in India, where he died on 30th April 1783. At this time he had no intention of returning immediately to Scotland; although he often professed his purpose of spending the last of his days in his native country.

Thus, a question arose between James Bruce, the brother-*consanguinean*, and Elifabeth and Margaret Bruce, the sisters-*german* of the deceased: the former contending, That the succession was to be regulated by the law of England, which, contrary to the law of Scotland, admitted no distinction, in cases of this sort, between relations by *full* and *half blood*: while the latter maintained, that as their brother was a Scotsman by birth, as his residence in India was merely occasional, and as he had expressed his intention of returning home as soon as he had acquired a fortune sufficient for his purpose; the law of Scotland ought to be the rule: more particularly, with regard to those effects, which, being in the way home to Britain, could not be said to be in England more than in Scotland.

It is unnecessary to repeat the arguments that were used: the Court having considered the plea maintained by Elifabeth and Margaret Bruces, with regard to the effects situated in India or in England, to be equally untenible, whether the *lex domicilii* or that of the *res sita* was to be the rule. With respect to the bills in their way to Britain, it was thought that they were to be regulated in the same manner, England being the place to which they were intended by the deceased, and where they were to be paid.

The judgement of the Lord Ordinary was in these words:

“ Finds, *1mo*, That as Major Bruce was in the service of the East-India Company, and not in a regiment on the British establishment, which might have been in India only occasionally; and as he was not on his way to Scotland, nor had declared any fixed and settled intention to return thither at any particular time, India must be considered as the place of his domicil. *2do*, That as all his effects were either in India, or in the hands of the East-India Company, or of others his debtors in England, though he had granted letters of attorney to some of his friends in Scotland, empowering them to uplift those debts, his *res sita* must be considered to be in England: Therefore finds, that the English law must be the rule in this case for determining the succession of Major Bruce, and consequently that James Bruce of Kinnaird is intitled to succeed, alongst with Elifabeth and Margaret Bruce, his sisters.”

June 1788.

COURT OF SESSION.

43

A reclaiming petition was preferred by Elifabeth and Margaret Bruce, and refused without answers.

Lord Ordinary, *Menbodo.*

For Elifabeth and Margaret Bruce, *Dean of Faculty.*

C.

N^o XXVI.

June 27. 1788.

HUGH INGLIS, and others,

AGAINST

GEORGE DEMPSTER.

RANKING AND SALE.—*No diminution of the judicial rental sufficient to annul a judicial sale.*

BETWEEN the year 1780, when a judicial rental of the lands of Skibo was made up, and the subsequent sale in 1786, the rents had fallen about a sixth part.

On this ground Mr Dempster, the purchaser, offered a bill of suspension; insisting, if he could not obtain a proportional abatement of the price, that he should be allowed to renounce the bargain altogether. He contended, That as so remarkable an alteration, if not intimated by the seller, would vacate a private sale, there was no reason for giving a different effect to one carried on under the authority of the Court of Session.

The Court, however, were unanimously of opinion, agreeably to many former determinations, that the plea here urged for Mr Dempster was inadmissible. As it was known that the chief object of the judicial rental was to ascertain the bankruptcy, and that in the interval which preceded the actual sale many alterations would necessarily happen, it was the business of intending purchasers to make a proper inquiry into the matter; and nothing but an undue concealment of the facts could annul a judicial sale, otherwise unexceptionable.

“The Lords found the letters orderly proceeded.”

Lord Ordinary, *Hailes.*
Clerk, *Sinclair.*

Act. *Blair.*

Alt. *Geo. Fergusson.*

C.

N^o XXVII.

N° XXVII.

July 2. 1788.

GEORGE CHARLES,

AGAINST

JAMES SKIRVING, and others.

BILL of EXCHANGE—*Cannot be protested against the acceptor on the day of payment.*

GEORGE CHARLES obtained from a debtor of his, a bill of exchange, payable one day after date; and on the day of payment, the debtor being confessedly unable to pay, he took a protest against him for not payment, and thereupon used arrestments, the validity of which was afterwards called in question by James Skirving and the other creditors of the bankrupt.

The Lords seemed to be of opinion, that if the protest had been taken on the day after, though within the days of grace, it would have been sufficiently regular. But this not being the case,

“ The Lords sustained the objection to the arrestment, that the bill
“ of exchange on which it was founded was protested on the same
“ day on which it became due.”

Lord Ordinary, *Hailes*.
Clerk, *Home*.

A&C. *Cha. Brown*.Alt. *Maconachie*.

C.

N° XXVIII.

N^o XXVIII.

July 8. 1788.

JOHN HAY,

AGAINST

ANDREW SINCLAIR and COMPANY.

BANKRUPT.—*The effect of an assignment of personal rights, in a question with creditors in general, regulated by its date, not by that of the intimation.*

A Debtor of Andrew Sinclair and Company, in security of certain sums instantly advanced to him, and also of other debts antecedently due, assigned to that company several shares which he had in a mercantile adventure.

The deed of assignment was dated in the month of January 1770; but no intimation followed till the 2d of October of the same year; and within much less than sixty days thereafter, as was alledged by Mr Hay, the trustee for the creditors in general, the assigner was rendered bankrupt in terms of the act of 1696.

Thus the question occurred, whether the effect of the assignment was to be regulated by its date, or by that of the intimation? For Mr Hay, it was

Pleaded: The enactment of 1696 had in view, not only the setting aside of those deeds of a bankrupt which were really fraudulent, but also to annul such latent transactions as tended to continue a man's credit after he was entirely divested of his effects. Hence, with regard to rights capable of investment, it was expressly declared, that their efficacy should not depend on the priority of the disposition or other conveyance, but on that of the investment, by which last alone the transference became publicly known. It may perhaps be said, that this part of the enactment does not extend to the case of personal rights. But in the application of a law intended like this, for the benefit of commerce, it is not the words, but the meaning and purpose of the legislature that is to be attended to. And surely, it would be singularly absurd to suppose, that while a conveyance of landed property, how insignificant soever, might be annulled on the head of *latency* alone, the wrong occasioned by a concealed assignment of moveable effects to the greatest extent was without a remedy. Indeed, it may be doubted, how far with regard to the latter any express provision was necessary; an assignment of a personal right, though it is held without intimation to be effectual against the granter, being of no force whatever, unless followed by intimation, in a question with

third parties, who have obtained a subsequent conveyance, whether voluntary or judicial, to the same right.

Answered: So far as the statute of 1696 is merely declaratory of the common law, by avoiding conveyances which are really fraudulent, it is no doubt to be construed largely, so as effectually to answer the purposes of the legislature. It has also been justly held, even with respect to that part of the statute which is of a correctory nature, by introducing certain legal criterions of fraudulent intention, that every act purposely framed to elude its enacting words, may be annulled, as done in defraud of the law itself. But where a transaction is neither intrinsically fraudulent, nor calculated to disappoint the provision of the statute, no case which the words of the law do not accurately reach can be governed by it. Thus, although in the case of land-rights, the taking of infeftment may be gone through with as much secrecy as the executing of the disposition or conveyance itself, so that it is by the subsequent registration alone that the alienation can be known to third parties, it has been repeatedly found, that unless where the recording has been intentionally delayed in order to deceive, the transference is valid, if the feisin has been published, as the statutes direct. As to the operation of the common law in cases like the present, it cannot admit of dispute. It is true, that in a competition between assignees of personal rights, either legal or voluntary, it is the intimation that regulates the preference. But actual bankruptcy, without a sequestration, or some other species of legal execution, gives to the creditors in general no right whatever to the effects of the debtor. And it cannot be denied, that long before any proceedings of this sort, the assignation had been rendered complete; Bruce, 17th February 1715, Creditors of Mr John Menzies *contra* Dr Menzies; Fac. Coll. 13th December 1782, Douglas, Heron, and Company, *contra* Maxwell.

“The Lord Ordinary sustained the defences.”

The question was afterwards considered by the Court, in a reclaiming petition and answers, and the same judgement was given.

Lord Ordinary, *Rockville*.
Clerk, *Gordon*.

A&A. *Buchan-Hepburn*.

Alt. *John Pringle*.

C.

N^o XXIX.

July 8. 1788.

ALEXANDER WILSON,

A G A I N S T

The MAGISTRATES of EDINBURGH.

PRISONER.—Act of federunt 1671. *Magistrates found liable for the sums due to an incarcerating creditor, even where the debtor had before his release obtained a Cessio bonorum.*

A Debtor of Alexander Wilson having been imprisoned in the jail of Canongate, obtained a judgement of the Court of Session, finding him intitled to a *Cessio bonorum*. This judgement was pronounced on 11th March, being the last day of the winter-session; and immediately after he was set at liberty by the jailor.

An action, founded on these proceedings, was brought by Alexander Wilson, against the Magistrates of Edinburgh, as proprietors of the burgh of Canongate, and responsible for the custody of persons confined in the jail belonging to it; when it was

Pleaded in defence: The obligation of magistrates with regard to the keeping of persons arrested for debt has been partly established by the common law, and partly by the act of federunt in 1671. But the present claim is incapable of receiving any support either from the one or from the other.

In the action created by the common law, it is necessary for the pursuer to show some actual loss to have arisen from the enlargement of the debtor; which, however, cannot in the present case be done. After the commencement of the vacation, it was impossible to prevent the extracting of the decret; so that the debtor must have unavoidably obtained his liberty in a few days. Besides, if it had been competent to bring the question under review, it will not be pretended that the creditor could have urged sufficient reasons for obtaining an alteration of the judgement.

Again, in the action founded on the act of federunt, it is not perhaps necessary for the pursuer to qualify any actual damage to have ensued from his debtor being set at liberty. But this regulation was merely intended to punish magistrates, who, from motives of personal favour, had permitted those committed for debt to go out of prison, without a necessary cause; whereas, in the present instance, the release of the debtor was not occasioned by any indulgence shewn to him by the magistrates, but by the misapprehension of the jailor, who
conceived,

conceived, that in the peculiar circumstances of the case, it would have been unjust to detain him any longer.

Answered: The general presumption of law undoubtedly is, that by means of the *squalor carceris*, a creditor may obtain payment of what is due to him, either from the debtor himself, or from those who are interested in his enlargement. Dict. *voc.* Prisoner.

And there is nothing in the present case which can give rise to an exception from the general rule. A decret of *Cessio*, before it is extracted, and still more at a time when, by the forms of Court, it is incapable of being extracted, is of no avail. Although it could not be set aside in the Court of Session, it might have been suspended by an appeal to the House of Lords. At any rate, even during the short space that ought here to have intervened between the determination and the complete execution of it, the liberty of the debtor might have been of such importance to his friends, as to have secured the payment of his debts.

As to the meaning put on the act of federunt, it is entirely destitute of foundation. It is the magistrates alone who, in the contemplation of law, are the keepers of prisons; and, instead of providing only for the case of a release obtained from motives of personal favour, the words of the regulation are quite general, declaring, that without a warrant from the Privy Council, or from the Court of Session, no prisoner shall on any account be discharged, unless in the particular circumstances therein mentioned.

The Court, considering a creditor to be intitled to demand a rigid confinement of his debtor, during the whole period prescribed by law, pronounced the following interlocutor.

“ The Lords having considered the informations for the parties, find the Magistrates of Edinburgh liable to Alexander Wilson for the full sums contained in the diligence at his instance, in virtue of which Alexander Crichton, his debtor, was imprisoned in the jail of Canongate.”

Reporter, Lord Henderland.
Clerk, Menzies.

A&A. Dean of Faculty.

Alt. Buchan-Hepburn.

C.

N° XXX.

N^o XXX.

July 10. 1788.

M^cMASTER, INGLIS, and COMPANY,

A G A I N S T

COLIN CAMPBELL.

PROCESS, COMPETITION, BANKRUPT.—*Effect of a decret setting aside a sale of lands, as in defraud of creditors.*

A Redeemable right of lands, in favour of Colin Campbell, was set aside in an action at the instance of the creditors of the seller, as importing a conveyance *omnium bonorum* in favour of a particular creditor. But Colin Campbell having soon made a compromise with the creditors, by whom the action was brought, he continued in possession for several years.

Some time after these proceedings, M^cMaster, Inglis, and Company, became creditors to the bankrupt. They deduced an adjudication against the lands which had been sold to Colin Campbell, and then brought a process of ranking and sale; to which he was made a party. In support of this action, it was

Pleaded: An agreement that has been set aside as fraudulent, cannot afterwards be attended with any legal consequences. The rights of all parties thereby become the same as if no such agreement had ever been made. When an illegal transference of property has been attempted, the original owner must therefore be understood to be reinstated in all his former rights: and these must, of course, be liable to attachment, indiscriminately, by all his creditors. Without this, instead of making room for an equal distribution of the bankrupt's effects, the right of the fraudulent acquirer would still subsist, so far as it did not interfere with those persons who had obtained the decret of reduction; and only such a part of the subjects in dispute, as corresponded to the extent of the debts due to them, could be brought to a judicial sale: a proceeding quite inconsistent with the established practice in cases of this sort.

Answered: Where a sale has been set aside, as injurious to the proprietor himself, the right of obtaining redress, as it is *in bonis* of him, must be available to his creditors in general. But where an agreement of this sort has been annulled, as hurtful merely to parties having a collateral or transitory interest, the effect of the decret is and must be so confined, as to afford a proper reparation to them only.

N

With

With regard to the feller himself, and with regard to those, who, becoming creditors to him at an after period, can only stand in his right, the transference is equally valid as if no objection had been competent. And where, as in the present case, the right of the persons, at whose instance alone the agreement was reducible, has been united with that of him against whom the action was competent, it is evident every possibility of a challenge must be precluded.

The pursuers farther contended, that as the defender's right was redeemable, they might still, on payment of the sums advanced, carry on the sale. This argument, however, was considered to be inadmissible. As adjudgers of the sale, they might pursue a declarator of redemption, if such an action was competent to him; but they could not immediately bring to a judicial sale lands which, *ex facie*, did not belong to their debtor.

"The Lords dismissed the action."

Reporter, *Lord Dreghorn*.
Clerk, *Home*.

Act. Wight.

Alt. Cullen, Abercromby.

C.

N° XXXI.

July 10. 1788.

JAMES MACCULLOCH,

AGAINST

AGNES MAITLAND.

TERCE—Not excluded by a disposition from the husband, followed with actual possession of the lands, but not with infestment.

HUGH MACCULLOCH sold his lands of Grange, and the purchaser entered into possession, but did not take infestment. After Hugh Macculloch's death, his widow, Agnes Maitland, insisted to be *kenned* to her terce. James Macculloch, the eldest son, objected; and,

Pleaded: Even at a time when feudal ideas were much more prevalent than at present, some of our most eminent lawyers were of opinion, that where a husband had sold his lands, his widow, after his death, could not claim a terce. The consequence of this would be, to disappoint the purchaser, without benefiting her, as she must, at any rate, be sufficiently compensated by the proportional increase of her share of the moveable effects. Besides, in this manner the terce would, contrary to the opinion of all our lawyers, become a burden on

on the moveable estate, the purchaser having retention of the price of the lands, which goes to executors. Accordingly, in a competition between a compriser, who is a judicial disponee, and a widow claiming her terce, it was found, although the compriser was not infest, that she was excluded. And in the same manner it has been determined, that an adjudger, after a charge given to the superior, was preferable to the widow claiming this legal provision; Dirleton, *voce* Terce; Sir Thomas Hope, *voce* Liferent; Dictionary, *voce* Heritable and Moveable, Terce.

Answered: The husband's feisin is the measure of the wife's terce, and no proceeding which has not the effect of completely denuding him, can preclude her right. Even where the husband dies in bankrupt circumstances, and adjudications have been led, or where he has granted dispositions in security containing clauses of infestment; still, if infestment has not actually followed, it is now firmly established, that she is intitled to be kenned to her terce, the only two questions which the jury are called upon to determine upon being; 1st, whether the widow was lawful wife to the deceased? and, 2^{dly}, whether the husband died seised in the lands specified in her claim? The determination of the case, in which it was found, that an adjudication, followed with a charge against the superior, was sufficient to exclude the terce, has since been justly departed from, this form, however effectual, by virtue of an express statute in the case of competing adjudications, being of no consequence in any other; Stewart's Answers to Dirleton's Doubts; Craig, b. 2. tit. 22. § 38.; Stair, b. 2. tit. 6. § 18.; Bankton, b. 2. tit. 2. § 16.; Erskine, b. 2. tit. 9. § 46.; Stair, 12th December 1677, Lady Fraser; 9th February 1725, Sarah Carlyle *contra* Creditors of Easter Ogle.

The sheriff having *cognosced* Agnes Maitland, the widow, to her terce, James Macculloch, the heir, preferred a bill of advocacy.

The question was reported on memorials, by the Lord Ordinary on the bills, when the Court were unanimously of opinion, that the judgement of the sheriff was well founded.

“The Lords refused the bill.”

Reporter, Lord Swinton.

A&A. Cha. Hay.

Alt. Fraser-Tytler.

C.

N° XXXII.

July 10. 1788.

JANET HENDERSON,

A G A I N S T

ARCHIBALD DUFF and JAMES HENDERSON.

SOLIDUM ET PRO RATA.—Tutor and Pupil. *Tutors having neglected to make up an inventory, liable singuli in solidum.*

DUFF, HENDERSON, and several other persons, were, by the father of Janet Henderson, nominated her tutors, it being declared that they were to be answerable for actual intromissions only, and each for himself alone. No inventory, however, of the father's effects was made up by those tutors. On that ground, Janet Henderson raised an action against Duff and Henderson, as having become liable *singuli in solidum*.

Pleaded for the defenders: By the statute of 1696, cap. 8. fathers are impowered to name tutors and curators to their children, under the conditions, that they shall not be liable for omissions, or *singuli in solidum*; which they would have been at common law, independently of the act of parliament 1672, c. 2. Under these conditions, the defenders were nominated. The first-mentioned statute, it is true, while it introduces an exemption from those common-law obligations, provides, "that nothing in it shall liberate from or dispense with the "making up of inventories," a thing enjoined by the other enactment. But this proviso cannot have the effect of subjecting the defenders, farther than to the peculiar penalties of the statute of 1672, such as, being denied reimbursement of expence laid out in the minor's affairs, or being removed as *suspect*; that of 1696 having excluded from the case the rules of the common law. Nay, though, in the terms of the statute 1672, they were to be held liable for omissions, it would not follow, that they should likewise be subjected *singuli in solidum*.

Answered: If there had been no mention of *inventories* in the statute of 1696, the obligation on tutors with regard to them would still have continued under the prior one of 1672, that enactment not being repealed; and surely a special *salvo* of this obligation cannot have an opposite effect: on the contrary, it plainly indicates, that without complying with that requisite of the former enactment, no benefit was to be derived from the latter. To suppose that any part of a statute was to have less effect because it enforced the common law, is
strange;

strange; and it is likewise a singular consequence of the defenders argument, that while tutors are to be deemed liable for the smaller and less culpable omissions to which are annexed the peculiar penalties of the act 1672, they should be exempted from the penalties due to such as are grosser or more blameable, because these are likewise inflicted by the common law. Nor is there any distinction between tutors being liable for omissions, or liable *singuli in solidum*. If there be misconduct in a co-tutor, it belongs to the rest to call him to account, and to have him removed as suspected. By the omission of that duty, they become each of them liable for such co-tutor.

The Lord Ordinary "found the defenders liable, conjunctly and " severally, and *singuli in solidum*."

The defenders having reclaimed to the Court, the Lords, on advising their petition, with answers, adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition, presented by the defenders, and appointed to be answered, was likewise refused.

Lord Ordinary, Swinton.
Clerk, Gordon.

Act. Wight, Abercromby.

Alt. Dean of Faculty, Rolland.

S.

N^o XXXIII.

July 10. 1788.

COLQUHOUN GRANT,

AGAINST

The REPRESENTATIVES of JAMES RICHARDSON.

WRIT. *A missive letter of tack sustained as effectual, though not holograph, the subscription not being denied, and possession having followed.*

AN action of removing from a farm having been brought against the heirs of James Richardson, they produced, as his and their own title of possession, that of both having been held for several years, a *missive letter* addressed to Richardson, and bearing the subscription of the landlord, which contained a promise to grant a *nineteen-years lease* of the lands. With respect to the verity of the subscription, the
O purfuer,

purfuer, who was trustee for the heirs of the alledged grantor, refused either to acknowledge or to deny it; and

Pleaded: Writing is essential to the constitution of every obligation concerning heritage. Such writing must be formal and probative, otherwise it has no legal effect. Not even an acknowledgement on oath, of the verity of the subscription to a writing not holograph, will there supply the want of the statutory requisites. That this is now an established rule, appears from the decisions in the case of Mackenzie *contra* Park, 15th November 1764, and of Stewart *contra* Bisset, in 1765; notwithstanding that formerly the point may have been differently understood.

Answered: Though to the transmission of landed property certain forms and solemnities are required, yet by less formal deeds a person may become effectually obliged to execute the proper legal conveyances for that purpose; Remark. Decis. 23d November 1748, Lord Kilkerran *contra* Paterfon; Kilker. Neil *contra* Andrew, 8th June 1748; Dict. of Decis. voc. *Locus pœnitentiæ*. It cannot then be doubted, that an obligation to grant a tack may be created in that manner. But *pactum de affedatione facienda idem est ac ipsa affedatio*; Craig, lib. 2. dieg. 10. § 10.; and when cloathed with possession, such a *pactum* cannot be objected to on account of any statutory informality; Dict. of Decis. voc. Writ.; Kilker. Crawford *contra* Wight, 16th January 1739; Falc. 20th December 1746, Foggo *contra* Milligan; Fac. Coll. Select Decis. 6th March 1753, Baron *contra* Duncan.

The Lords assoilzied the defenders.

Lord Ordinary, Stonefield.
Clerk, Orme.

A&A. Lord Advocate.

Alt. Elphinston.

S.

N^o XXXIV.

N^o XXXIV.

July 10. 1788.

CREDITORS of HUGH SETON,

A G A I N S T

W A L T E R S C O T T.

BANKRUPT.—Act 1696. Act of sederunt 1685.—RIGHT IN SECURITY.—*How far the debts affecting a bankrupt-estate conveyed to the purchaser at a judicial sale, upon payment, are extinguished to every other effect, except that of securing the purchaser.*

THE bankrupt-estate of Appine was purchased at a judicial sale by Mr Seton. On the creditors receiving payment out of the price, conveyances of their debts were made in trust, for the behoof of Mr Seton, to Mr Scott, his agent or man of business. Mr Scott afterwards laid out considerable sums of money on Mr Seton's account; and for Mr Scott's farther security, Mr Seton executed deeds by which he consented and declared, that Mr Scott should continue vested with the rights to the Appine debts until those due to himself were paid.

Alexander Farquharson, the heir of the cautioner for the price of the estate, then obtained from Mr Scott a disposition to the Appine debts, for the sole purpose of securing his relief against that cautionary obligation.

In the process of ranking of Mr Seton's creditors, he having become bankrupt, Mr Scott, in consequence of those circumstances, claimed a preference over the other creditors.—To this claim they objected; and

Pleaded: By act of parliament 1695, c. 6. it is enacted, with respect to judicial sales of bankrupt-estates, That upon the payment of the price to the creditors by the purchaser, the lands purchased "shall be for ever disburthened of all the debts and deeds of the bankrupt." And in order that the purchaser, in the event of the lands being evicted through defect of title in the bankrupt, might recover the price paid, from the creditors who received it, they were required, by act of sederunt of 31st March 1685, to convey their rights and diligences in his favour. Such conveyances, then, being solely corroborative of the purchaser's right, can never operate as a charge against the estate. They are more properly extinctions of debt, discharges or renunciations being never in practice employed for that end. Nor could

could these last be necessary with respect to debts which are really extinguished by payment itself. That payment has this effect is evident; for otherwise the heirs of the bankrupt-proprietor might still be sued for them, which will not be maintained. Accordingly no attempt like the present has ever before occurred.

Were those debts conceived to continue in existence, the consequence would be alarming. Suppose a bankrupt-estate judicially purchased a century ago, the debts subsisting by virtue of conveyances to the purchaser, while no prescription could run against them in his own person; the present owner might, after exhausting the estate by granting heritable securities, employ the old unknown conveyances as a new fund of credit, by which he could in an instant cut off the whole claims of those real creditors. The operation now in question is evidently of a similar tendency. That the debts do not constitute a separate estate, but subsist merely in aid of the purchase, appears from this, that if a purchaser at a judicial sale, after taking conveyances of the debts to himself, his heirs, and assignees, were to entail the estate, no separation of succession would result by the debts devolving to the heirs-general, but both estate and debts would go to the heirs of provision.

Besides, Mr Scott is not even vested with the right to those debts, he having assigned that right to Mr Farquharson, in whose person it must continue as long as any part of the Appine debts remain unextinguished.

Answered: No *ipso facto* extinction of debts affecting an estate, is known in the law of Scotland. Until annulled by discharges and renunciations, therefore, they must subsist as a separate subject from the estate, though both should become the property of the same person. The estate and the debts accordingly may be separately disposed of by transference *inter vivos*, or by succession, or may be differently affected by debts; Gilmour, N° 33. Whitekirk *contra* Ednam; Fountainhall, 2d January 1705, Hope *contra* Gordon; Kames's Remark. Decis. 26th June 1745, Creditors of Auchinbreck *contra* Campbell. In the case of entailed estates this separation is often strongly exemplified, the heritable debts devolving to one series of heirs while the lands descend to another. Nor have the enactments relative to judicial sales made any alteration of this established rule of law.

The statute of 1695 is evidently framed for the benefit of the purchaser alone, and cannot be construed as if it had been intended for his prejudice, by limiting his rights at common law. It is only so far as it tends to his security, that as soon as the heritable debts are paid by him, the estate is to become *disburdened of them*; not that they should be extinguished, with respect to his powers over them. If indeed they were thus to be totally extinguished, there would be an absurdity in the idea of conveyances in terms of the act of sederunt; an act, by the way, which did not introduce those conveyances, they being coeval with the origin of judicial sales, but which had for its object the extent of the warrandice implied. And were there an *ipso jure* extinction of the debts by payment, the same consequence

sequence would attend the purchaser's succeeding as heir to any of the creditors ; in which case, whether he would or not, he must have become *passive* liable for the whole debts of that predecessor, which is absurd. The keeping up of heritable debts affecting lands sold by judicial sale, is in many instances the established practice of the country ; such as those of the estates of Covington, Kinross, Hardington, and of Dalmahoy. See also Fac. Coll. 19th January 1757, Earl of Buchan *contra* his Father's Creditors ; Dict. of Decis. vol. 2. *voce Surrogatum*, 16th December 1725, Cockburn *contra* Creditors of Calderwood. If a purchaser choose to extinguish such debts, he must take the conveyances not *tanquam quilibet*, in the form of the present one, but *qua* purchaser, framed with peculiar clauses calculated to evacuate them for ever. The idea of insecurity from unknown or latent burdens affecting the lands is not well founded. Every debt ranked upon a bankrupt-estate is constituted either by infestment or by adjudication, and is entered on record ; it is likewise particularly recited in the decret of ranking and sale. Of the existence then of such debt, information could not be wanting ; after which no person possessing common prudence would either purchase the estate, or lend money upon it, until he saw himself properly guarded against that obvious hazard.

With respect to the conveyance in favour of Mr Farquharson, it is no more than a burden or rider upon the radical right of Mr Scott, the exercise of which it cannot interrupt.

The Lord Ordinary took the cause to report on informations, when a small majority of the Court were of opinion, that Mr Scott's claim of preference was not well founded ; but of that number, it is to be observed, some Judges seemed to be moved solely by the specialty relative to the conveyance to Mr Farquharson.

The Court sustained the objections to the preference claimed by Mr Scott ; and they adhered to this interlocutor, on advising a reclaiming petition and answers.

Reporter, Lord Swinton.
Alt. Lord Advocate, Abercromby.

For Mr Scott, Elphinston, Cha. Hay.
Clerk, Menzies.

S.

N^o XXXV.

July 15. 1788.

WILLIAM HANNAY,

AGAINST

JAMES STOTHERT, and others,

SALE.—*Condition, That if the highest offerer at a sale do not find caution within thirty days, the purchase shall devolve on the immediately preceding offerer,—how interpreted.*

THE lands of Newlaw were exposed to sale in different lots, under the authority of the Court of Session.

It was provided by the articles of the roup, that by subscribing their respective offers, the different bidders should be obliged to pay the price, with a fifth part more by way of penalty.

It was farther provided, That if the highest offerer failed to find security within thirty days, the purchase should devolve on the one whose offer was next to his; intimation being to be made to the latter within ten days after the devolution had taken place. But it was at the same time declared, that the exposers might still sue the highest offerer for the difference of the price, and for the penalty.

William Hannay was the highest bidder for all the different lots; but owing to some mistake, his sureties were not ready within the thirty days. Two days after that period, intimation was made by the common agent in the sale, to James Stothert, and the other offerers; but before any farther proceedings were held, a bond was presented by Mr Hannay, subscribed by him and his cautioners.

A petition was afterwards preferred to the Court, in behalf of Mr Hannay, praying that his bond should be received, and urging the severe consequences that would ensue from his being foreclosed, as he still continued liable for the difference of the price, and for a fifth part more, if the creditors chose to insist rigidly on their right. In this he was opposed by James Stothert and the other offerers.

The Court, in giving judgement against Mr Hannay, were principally moved by the intimation that had been made to the immediately preceding offerers. It was observed, that although the readiness which Mr Hannay had shown to rectify the error into which he had fallen might have the effect, in a question with the exposers, to relieve him from the penal consequences above mentioned, those whose offers were next to his, by being called on to perform their part of the agreement, had thus acquired a right to demand reciprocal performance,

ance, which no equitable considerations in favour of third parties could take away.

After advising the petition for Mr Hannay, which was followed with answers, replies, and duplies,

“ The Lords preferred James Stothert,” &c.

A reclaiming petition, afterwards presented for Mr Hannay, was refused.

Lord Ordinary, *Swinton*. For Mr Hannay, *Lord Advocate*.
For Mr Stothert and others, *Geo. Fergusson, Honyman, Armstrong, Douglas*.
Clerk, *Home*.

C.

N^o XXXVI.

July 16. 1788.

[TEIND-COURT.]

The OFFICERS of STATE,

AGAINST

JAMES CHRISTIE.

TEIND.—These bishops tithes are alone exempted from the burden of augmentations, which belonged to that rank of the clergy at the Reformation.

THE teinds in the parish of Scoonie belonged to the priory of St Andrew's, which, after the Reformation, was erected into a temporal lordship, in favour of the Duke of Lennox.

In 1629, the teinds of the lands of Durie, a considerable estate in this parish, were purchased from the Duke of Lennox by Sir Alexander Gibson; and in 1635 the remaining tithes were purchased by Charles I. and appropriated to the see of St Andrew's.

Afterwards, the minister of the parish obtained an augmentation, and having insisted in an action for localling the additional stipend, it was found, that James Christie, as standing in the place of Sir Alexander Gibson, had an heritable right to the teinds of the lands of Durie. But it was nevertheless contended on the part of the Officers of State, that the teinds of Durie ought still to be allocated, because the whole remaining tithes had belonged to the Archbishop of St Andrew's,

drew's, and this agreeably to the determination of the Court in the cases of Lochnell and Arngalk.

Pleaded for Mr Christie: It is not from any general privilege attending bishops tithes, that they have been found in some cases to be exempted from the burden of additional stipends; but in consequence of the proceedings in 1629, on occasion of the general submission to Charles I. when a particular exemption was made with regard to tithes *then possessed by bishops*. It would indeed be extremely unjust, if, in consequence merely of tithes having been at any after time appropriated to a bishop, the proprietors of the other tithes should be exposed to any loss. And it is of no importance, that the act 1693 declares in general terms, that the commissioners shall have no power "to order the *buying or selling* of such teinds as had formerly "belonged to the bishops, and now belonged to their Majesties, by "the abolition of Prelacy, and that as long as the said teinds shall "remain in their Majesties hands undisposed." This part of the enactment was solely intended to remedy a defect in the prior act of 1690, by putting teinds of the description therein mentioned, with regard to the landholder's right of purchasing, on the same footing as they had formerly been, when the decret-arbital pronounced by Charles I. was the rule in all questions of this sort; 9th February 1734, Don of Newton *contra* Kerr of Littledean.

Answered: It is a mistake to suppose, that the exemption with regard to bishops teinds arose entirely from the proceedings held in the reign of Charles I. The reason of it evidently was, the peculiar favour due to bishops as a superior order of ministers; and the inequality supposed to arise from it is altogether imaginary. For why should the purchasers of tithes after the Reformation, be in a better situation in this respect than those who had acquired the tithes of their lands at an earlier period? The enactment of 1693, however, seems to put this matter beyond dispute: all tithes that had ever belonged to bishops being, without distinction, put in the same situation. As to the decision quoted on the other side, it is not, when properly considered, of any authority in the present argument, the tithes there having been sold to the King, "with the burden of the ministers stipends;" which precluded any determination of the general point.

A scheme of locality having been prepared, in which no part of the augmented stipend was laid on the lands belonging to Mr Christie, it was approved of by the Lord Ordinary.

A reclaiming petition was afterwards preferred by the Officers of State, which was followed with answers and replies.

"The Lords affirmed the judgement of the Lord Ordinary."

Lord Ordinary, *Ankerville*.

A&S. Solicitor of Tithes.

Alt. Rollind.

C.

N^o XXXVII.

N^o XXXVII.

July 19. 1788.

DAVID GREGORY,

AGAINST

DAVID and MARGARET BURT.

BURGH.—*A party building in virtue of a jedge and warrant, must restore the subjects as soon as the sums disbursed by him have been recovered out of the rents.*

THE predecessors of David and Margaret Burt having, under the authority of the dean of guild, rebuilt a house in the town of Perth, which belonged to David Gregory, he brought an action for recovering possession; alledging, that the money laid out in building had been fully repaid out of the rents.

Pleaded in defence: The law authorising the rebuilding of ruinous houses within burgh, was intended as a punishment on negligent proprietors, and at the same time to encourage other persons to employ their money in this way, *ne urbes ruinis deformentur*. When, therefore, it is declared, as has been done in the present case, by the sentence of the dean of guild, that the builders shall retain possession “until the full sums laid out by them are paid,” it is obviously meant that the rents shall belong to them, till the owner appears and makes payment of what has been laid out. Without this, no one would be so imprudent as to employ his funds in this manner, as he could not in any event receive more than he had actually disbursed, and at the same time might lose every thing, if by any accident the buildings were destroyed.

Answered: If it had been intended to encourage mere money-lenders to employ their wealth in the reparation of ruinous houses within burgh, the defender’s argument would undoubtedly be of some weight. But the framers of this regulation had nothing more in view, than to give to tradespeople an opportunity of getting employment for themselves; knowing that this would be a sufficient inducement to them. The words uniformly used in the proceedings before the dean of guild, obliging the builders to make restitution as soon as the sums disbursed by them shall have been paid, would alone be enough to show this to have been the intention of the law.

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The Lord Ordinary found, "that the defenders were obliged to cede the possession, on receiving the sums ascertained by the decret of the dean of guild to have been disbursed in rebuilding the house, so far as they have not been compensated out of the rents."

After advising a reclaiming petition for David and Margaret Burt, with answers for David Gregory, the Court not unanimously affirmed the judgement of the Lord Ordinary.

Lord Ordinary, *Braxfield*.
Clerk, *Sinclair*.

Adv. *Chas. Hay*.

Adv. *Robt. Craigie*.

C.

N^o XXXVIII.

July 24. 1788.

ROBERT HAY,

AGAINST

Miss FRANCES HAY.

SUCCESSION. CLAUSE.—*The expression, "lawful heirs-male," employed in certain parts of an entail, with the same meaning, so far as appeared, as that of "heirs-male of the bodies" of the substitutes, used in other places of the deed, was, nevertheless, strictly interpreted in conformity to the words.*

SIR ROBERT HAY of Linplum executed a deed of settlement, by which he devised his estate to such of the younger sons of the family of Tweeddale as were then in existence, *nominatim et seriatim*, and the *heirs-male of their bodies*, "whom failing, to Alexander Hay, second son to Alexander Hay of Drummelzier, and *his lawful heirs-male*;" and, after some other substitutions, "to the heirs-female of the body of John Marquis of Tweeddale." From the tenor of the deed, however, it appeared highly probable, that the alteration of the expression "heirs-male of the bodies," as applied to the Tweeddale family, into "lawful heirs-male," employed with respect to that of Drummelzier, was not occasioned by any difference in the intention of the granter, but had crept in through the inaccuracy or want of skill of the writer, who was not a conveyancer by profession.

Alexander Hay died without issue; and the prior substitutes having failed, the succession was claimed by his brother, Robert Hay, as his heir. It was likewise claimed by Miss Hay, as heir-female of John Marquis

Marquis of Tweeddale, the intermediate substitutes having also failed. In the competition of brieves which followed, it was

Pleaded for Miss Hay : When, in interpreting the settlement of an estate, a doubt arises with respect to any restriction or limitation of property, no latitude of construction ought to be allowed ; but when the only question is, whether the granter has devised his succession to one heir or to another, the opposite principle prevails, and that construction is to be adopted which is best calculated to give effect to his will, *secundum id quod credibile est cogitatum*, l. 24. ff. *De Reb. dub. Voet. ad eund. tit.* § 4 ; Blackstone's Commentaries, b. 2. chap. 23. No doubt the term *heirs-male* commonly denotes heirs-male in general ; yet it is capable of being limited to the *heirs-male of the body*, when from circumstances such is evinced to have been the will of the devisor. A similar interpretation of the parallel expression *heirs-female* has had repeatedly the sanction of the Court ; Dict. of Decis. vol. 3. p. 73. And in the Civil law, the rule is established, l. 17. § 8. ff. *Ad senatusconsult. Trebell.* ; Mantica, *De conjecturis ult. volunt. lib.* 8. tit. 14. § 6. Even the statute of 1685 affords an instance of the limited interpretation of the word "heirs," it being there confined to descendants alone. If, then, the expression in question can possibly be understood of the *heirs-male of the body*, and not the *heirs-male in general*, of Alexander Hay, that first construction should be admitted, as evidently more conformable to the views of the entailer.

Answered : There is no room here for a *quæstio voluntatis*, since the expression of the entailer is not ambiguous, but precise and definite ; the term *heirs-male* having only one signification. The authority of the Roman law, or of civilians, however weighty in other matters, is but of little avail in questions of tailzied succession, which may relate to various heirs and substitutions unknown in that law. At the same time, unless the words *alieno hærede*, which occur in l. 17. § 8. *Ad SCtum Treb.* be converted into *sine hærede*, a change for which there is no authority, that text will not support the opposite argument. With regard to the supposed limited acceptation of the word "heirs" in the language of the act 1685, it is not the descendants alone of the person forfeiting that are there meant, but such of his heirs, whether of his body or not, as are called by the entail, in opposition to the person next in substitution and his heirs. The calling of persons and their heirs in general, though not usual in entails, is exemplified in the entail of Duff of Braco, Record of Tailzies, vol. 4. p. 340. It is only to be added, that the doctrine now maintained was strongly sanctioned by the judgements of the House of Lords, in the cases of Baillie *contra* Tennent, 17th June 1766, and of Edmonstone *contra* Edmonstone, 24th November 1769.

The cause was reported on informations appointed by the Judges Assessors to the Macers, when

The Court considered themselves as bound to give judgement according to the signification of the term in question, it being by the majority

majority deemed unambiguous ; notwithstanding that the probable intention of the entailer was admitted to be contrary.

The interlocutor of the Court was as follows : “ The Lords find,
“ That the claimant Robert Hay is perferable, and intitled to be served heir of tailzie and proviſion, under the ſettlement in queſtion.”

To this interlocutor they adhered, on adviſing a reclaiming petition with answers.

Reporter, Lord Monboddo.
Alt. Lord Advocate, Blair.

For Mr Hay, Wight, Rolland.
Clerk, Menzies.

S.

N^o XXXIX.

July 28. 1788.

Mr THOMAS ROBERTSON,

AGAINST

The EARL of ROSEBERRY.

MANSE.—*Presbyteries, though they may authoriſe the repairing or rebuilding of manſes, have no power to enlarge them.*

AFTER Mr Robertson was ſettled as miniſter in the pariſh of Dalmeny, his manſe was built from the foundation ; but though this was done with his entire approbation, it was neither completed according to the plan propoſed by the preſbytery, nor afterwards approved of by them.

At the diſtance of ſome years, Mr Robertson, finding, from the increaſe of his family, that the manſe was not ſufficiently large, made a new application to the preſbytery, who, beſides ſome trifling alterations, directed a kitchen to be built adjoining to the houſe. Of theſe proceedings the Earl of Roſeberry, a conſiderable heritor in the pariſh, complained to the Court of Seſſion by a bill of ſuſpenſion ; when Mr Robertson

Pleaded: It was in the power of the heritors of this pariſh, effectually to preclude any demand that the miniſter might be inclined to make for altering or enlarging his manſe ; and this either by adopting the plan ſuggeſted by the preſbytery, and afterwards bringing ſufficient evidence of the work being properly executed, or by building a manſe, and then requiring a viſitation of the preſbytery, who, if no objection occurred to them, muſt have reported the ſufficiency of the whole. But as neither of theſe expedients were fallen upon, it muſt ſtill be competent for the incumbent to require ſuch alterations as the

the state of his family or other circumstances render necessary; 21st February 1786, the Heritors of Cairney *contra* the Moderator and other Members of the Presbytery of Strathbogie.

Answered: For the decent and comfortable accommodation of parochial ministers, the law has authorised presbyteries, in case of any negligence or unwillingness on the part of the heritors, to direct the rebuilding or reparation of manse, as the circumstances of the case may require. But there is not the least room to imagine, that it was intended to impower ministers, from time to time, to demand such alterations as might be thought necessary for their peculiar exigencies. Besides rendering the burden on the landholders infinitely more heavy than is at all requisite, this would open a door for continual disputes between ministers and their parishioners, to the diminution of the respect due to that class of men, and consequently extremely hurtful to their general usefulness. In the case, accordingly, of the minister of Ceres *contra* the Heritors, where such a demand as the present was made, it was, with great unanimity, disallowed by the Court.

“ The Lords suspended the letters *simpliciter*.”

Reporter, Lord Dunfinnan.
Clerk, Sinclair.

Aff. Hope.

Alt. Honyman.

C.

N^o XL.

July 29. 1788.

ARCHIBALD HAMILTON,

AGAINST

JOHN WOOD, and others.

HYPOTHEC—*does not take place on ships for repairs made in home-ports*

IN a competition of creditors, Wood and other persons, by whom a ship belonging to the bankrupt had been repaired in a home-port, claimed a right of hypothec as thence arising on the ship itself. To this claim Hamilton, the trustee of the creditors at large, objected; and

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Pleaded:

Pleaded: There is nothing in the situation of persons who furnish labour or materials for the repairing of a ship, to create a right of hypothec, more than in that of all those who perform any other work, or provide any other materials. The contract of sale takes place as to the one, and of *locatio conductio* as to the other; but in neither does any real right remain in the creditor after delivery of the subject. The Roman law admitted a great number of tacit hypothecs, which are altogether rejected in ours; yet among these the hypothec now claimed had no place. They who lent money for building or repairing, or even buying a ship, had indeed by it a privilege beyond other creditors, but no right of hypothec; l. 26. ff. *De reb. auct. jud. poss.* To the genius of our law all tacit hypothecs are adverse. Balfour, employing the words of the *Regiam Majestatem*, states it as a rule, "That without delivery there can be no impignoration;" Pract. p. 194. Nor in any of the more early writers is there the least intimation of the right now claimed. When Lord Stair (b. 1. tit. 13. § 18.) mentions the hypothecating of a ship for "what was borrowed for the use of the ship's company or voyage," he must necessarily refer to a special contract of hypothec by the master; for a tacit hypothec to such an extent never existed any where. As the right in question, then, results not from the nature of the contract to which it relates, so it is as unknown in the common as in the statute law; for it is in vain to talk of a common-law right which was unheard of at the end of the last century.

In the case of *Gay contra Arbuckle*, 16th November 1711, it seems indeed, at first view, as if the Court had recognised this tacit hypothec to the extent insisted on; but when its peculiar circumstances are examined, they will be found not necessarily to involve that conclusion; which, however, appears better warranted by the decision in the later case of the *Rope-work Company of Glasgow contra Crosses*, 4th March 1761. The admiralty-court, too, in several instances during the present century, have given their sanction to the claim now in dispute: but those judgements were combined with others manifestly erroneous and illegal. Nor will the decisions of that court, in whatever series, constitute the law. That is the prerogative of this Supreme Court. Yet even here, if not only a single one, but a course of decisions, have proceeded on an erroneous principle, there is nothing to prevent the error from being corrected by a subsequent determination. Of this the decision in the case of *Keith contra Keith*, 17th February 1688, affords a remarkable example, by which the Court altered what had been determined by a number of preceding judgements, then finding, that a wife was *not* a privileged creditor for implement of provisions in her marriage-contract. See Dict. of Decis. *voc.* Privileged debt.

It is true, that in foreign voyages the right of hypothec may be necessary to induce strangers to furnish the repairs which are wanted; but with respect to a home-port, as in the present instance, no such necessity can be pleaded to justify a claim so evidently adverse to the interests of commerce. This distinction is established in the law of England, which deserves peculiar regard, as that of the first commercial country in the world.

Answered:

Answered: It has been admitted, that the hypothec in question exists for repairs made in a foreign port; and it is plain, that the *lien* created by bonds of bottomry is equally latent as any right of hypothec can be. The argument, then, from expediency, is defective; because no new inconvenience can be attributed to the present claim. The law of Scotland makes not any distinction on the subject of hypothec between foreign and home ports, more than did that of the Romans respecting their *privilegia*. No such distinction is to be traced in any of our earlier writers on the law; and Mr Erskine, the latest of them, lays down the rule in general, "That the repairers of a ship have an hypothec upon it, in security of the expence of reparation." The corresponding practice and sense of the nation are evinced by the uniform decisions of the admiralty-court downward from 1704, sustaining the right in question, whether relative to the ports of this part of the united kingdom, or those abroad; decisions which, though not so authoritative as if they had been pronounced in this Court, serve equally to show the general acquiescence of the country. The decisions of this Court also, during the course of a century, confirm the same doctrine; for example, in the case of Gay and others *contra* Arbuckle, in 1710, and of the Rope-work-Company of Glasgow *contra* Croffes, in 1761. It is difficult to conceive, then, by what other means the point could have been better established in the common law of Scotland. And being so fixed, no reason can be assigned why it ought to be overturned. Were its conformity to the general commercial law of Europe to be deemed a criterion, it could not be overthrown, since, England excepted, the right of hypothec to the extent now claimed seems to be recognised by all the trading states; and in Holland, in particular, it is undoubtedly admitted. At the same time it is evident, from what has been already stated, that this question never can arise in our courts but between Scotsmen with respect to furnishings made at a home-port.

The Lord Ordinary sustained the claim of hypothec. But

The Court, on advising a reclaiming petition against that interlocutor, with answers, as also "a case transmitted for the opinion of English counsel, with the opinion, stating the law and practice of England thereon, found, That Wood and the other furnishers had no hypothec or right of bottomry on the ship in question."

And to this judgement, after an intermediate contrary one, the Court finally adhered by two successive interlocutors.

Lord Ordinary, *Braxfield*.
Alt. Dean of Faculty, *M'Cormick*.

For Hamilton, *Rolland*, *Blair*, *Ross*.
Clerk, *Menzies*.

S.

N. B. The Court, at the same time, decided in like manner a similar question between John Syme, and Reynold Pohl in the right of Gavin Kempt.

N^o XLI.

N^o XLI.

July 31. 1788.

JAMES SHARP,

AGAINST

JOHN BURT.

TACK.—CLAUSE: *Clause in a lease, obliging the tenant to give up part of his farm, on receiving an equivalent deduction from the rent, how interpreted.*

IT was stipulated in a lease granted by James Sharp of Kincarrochy to John Burt, that the latter should, upon requisition, give up the "offices, garden, and three of the parks adjacent to the mansion-house, on receiving an equivalent deduction yearly from the tack-duty, to be fixed by neutral persons mutually chosen."

After an interval of some years, Mr Sharp availed himself of this stipulation. In the mean time, the value of the farm had considerably increased, partly in consequence of the general augmentation of the rents of land, partly in consequence of certain meliorations performed by the tenant, but chiefly by means of some peculiar circumstances which could not be foreseen by either party.

The question, therefore, occurred, whether the abatement to be given to the tenant was to correspond to the yearly value of the land as it then stood, or whether it was to be proportioned to the rent stipulated in the lease. Mr Sharp

Pleaded: It was the obvious meaning of the parties, that with regard to three parks contiguous to the mansion-house, the leaseholder should consider himself as a tenant at will, his lease, after requisition by the landlord, being, to this extent, to be equally done away as if it had never existed. And the only reason why a reference was made to neutral persons, for ascertaining the allowance to be given on account of these lands, was, that at the beginning of the lease the separate value of each park had not been precisely fixed. This indeed is implied in the words here used, *an equivalent deduction*, when contrasted with the rent actually paid, which must be considered as the full yearly value of the whole farm, being the same with a *proportional* one. If it had been intended to make the landlord merely a subtenant of the grounds which he had a right to possess, instead of framing the agreement in this way, it would have been declared, that on the landlord's taking back any part of the farm, he should pay the full value, as it should be fixed from year to

to year, during the lease. Any other interpretation, too, would be productive of this remarkable absurdity, that if the value of the three parks should by any accident exceed the rent of the whole farm, the stipulation would become elusory, as the referees are to have no farther power than to grant an abatement of the rent.

Answered: The words *equivalent* and *proportional* are not synonymous, the one denoting something of equal intrinsic value, while the other has a reference to a precise given standard; and no reason can be given why these words should not be here understood in their natural meaning. As the tenant might have been constrained to continue his possession although the farm should fall in its value, it would be unjust to exclude him from the advantages resulting from a contrary event. In another respect too, this stipulation, according to the construction put on it by the landlord, would be equally hurtful to both parties. For, as the three parks which he has a power of resuming are not particularly specified, the farm must thus remain unimproved during the whole period of his possession, unless the tenant chose to give up, without any recompence, the whole advantages of his industry.

Some of the Judges thought, that the claim of the tenant was to be restricted to the increased value of the lands, as arising from the meliorations performed by him. But the majority were of opinion, that both according to the words, and a fair construction of the lease, the tenant ought to receive the full value of the lands which were taken from him.

The Lords therefore affirmed the judgement which had been pronounced by the sheriff-depute of the county, in these words: " Finds, " That the tenant is intitled to such a deduction for the parks which " he is bound to give up, as is equivalent to the rent at which they " would now be let."

Lord Ordinary, *Henderland*.
Clerk, *Hume*.

Adv. *Blair*.

Adv. *Corbett*.

C.

N° XLII.

August 5. 1788.

ROBERT PRINGLE,

AGAINST

ALEXANDER NEILSON.

BENEFICIUM COMPETENTIÆ.—*How far competent to one who has obtained a Cessio bonorum.*

ROBERT PRINGLE, formerly a retail dealer in the town of Dalkeith, after having obtained a *Cessio bonorum*, was employed as a merchant's clerk, in which capacity he had a salary of L. 25 *per annum*. Having furnished a small house for the reception of his family, consisting of a wife and several children, a pouding of the furniture was attempted by Alexander Neilson, a creditor of his to the extent of L. 4 : 16 : 9, who had been summoned in the process of *Cessio*. An arrestment of the salary was also used.

Robert Pringle offered a bill of suspension, in which he

Pleaded : A decret of *Cessio* does not, like a certificate of bankruptcy in England, procure a total release to the debtor, any property he afterwards becomes master of being still, in general, attachable by his creditors. But while, in this manner, a proper care has been taken by our law, to hinder a perversion of this humane remedy, it has been equally an object of attention, that it should not, by an over-rigorous execution of diligence in virtue of prior debts, be entirely frustrated. With this view, the *beneficium competentie* has been introduced, whereby not only the debtor's wearing apparel, and the implements of his trade, but also such a portion of the effects acquired by him after obtaining the *Cessio* as is indispensably necessary for his support, are secured to him. In the present case, where the sums earned by the debtor are barely sufficient, with the utmost frugality, to maintain him and his numerous family in that decent manner which the nature of his employment requires, the proceedings that have been held must appear equally irregular and unauthorised ; *Quon. Attach. c. 7. § 3. ; Erskine, b. 4. tit. 3. § 27.*

Answered : In consequence of a *Cessio bonorum*, a debtor merely obtains an exemption from personal arrests. Whatever he afterwards acquires, whether by his own industry or by other methods, is liable to

to the diligence of his creditors. If, indeed, a creditor were to exercise his right in an oppressive manner, as by pouding the body-clothes of his debtor, or the tools which are necessary for providing his subsistence, this, as an abuse of legal execution, would be liable to correction. But beyond this our customs have never gone; the *beneficium competentiae*, as known in the Roman law, being only admitted with us in the case of gratuitous obligations, or in those where the parties stand in the relation of parent and child to each other. And in circumstances such as the present, where the sums due to the user of the diligence are so inconsiderable, that after payment, there is still a sufficiency left for enabling the debtor to live with that frugal œconomy which becomes one in his unfortunate situation, it seems impossible to doubt the legality of the measures that have been followed; 11th July 1778, Patrick Reid *contra* Matthew Donaldson.

The Lord Ordinary suspended the letters “ *quoad* the suspender’s person, wearing apparel, and working-tools, but found the letters “ orderly proceeded *quoad ultra*.”

After advising a reclaiming petition for Robert Pringle, with answers for Alexander Neilson, it was

Observed on the Bench: There is no example where the *beneficium competentiae*, in the extent known in the Roman law, has been recognised in the Scots courts. And in the case under consideration, it does not seem necessary to give any determination on the point. But if the creditors of a bankrupt who had obtained a *Cessio*, were to proceed in such a way as not even to leave him the necessities of life, as the purpose of the law would thus be frustrated, it would doubtless be competent for the Court of Session to apply a remedy.

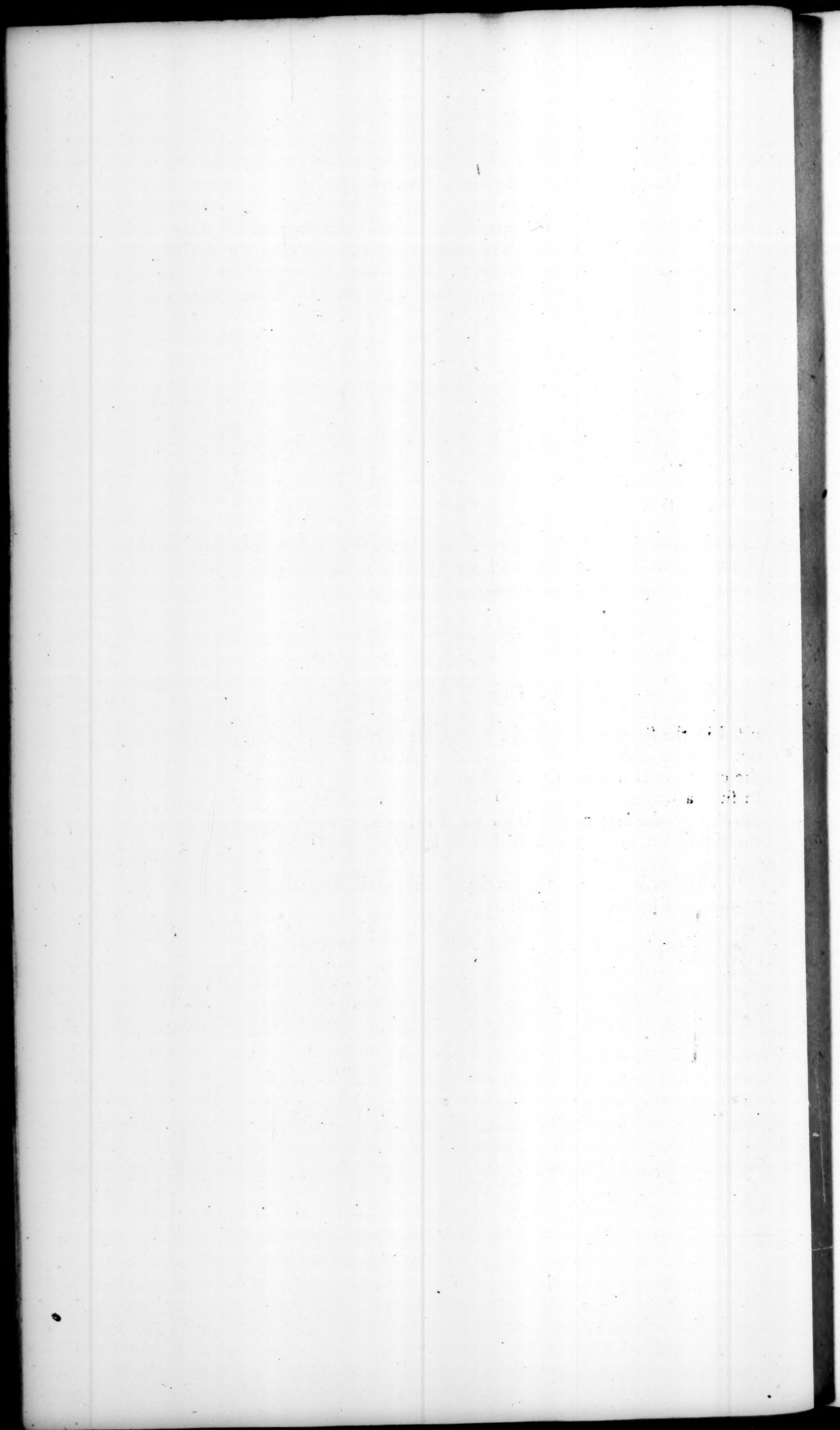
“ The Lords refused the petition,” thus affirming the judgement pronounced by the Lord Ordinary.

Lord Ordinary, *Dunfennan*.
Clerk, *Sinclair*.

A&T. *Dickson*.

Alt. Geo. *Ferguson*.

C.



DECISIONS

OF THE

COURT OF SESSION.

Nº XLIII.

November 13. 1788.

JOHN YULE,
AGAINST
DAVID ROBERTSON.

EXHIBITION.—OATH OF PARTY.—*A party being examined as a haver, not competent to put a question relative to the existence of the debt.*

ROBERTSON being debtor to Yule, attested an account of different articles composing the debt. In an action for payment of it, Robertson, by virtue of letters of incident diligence, was examined on oath, Whether he himself had not the attested account in his possession. In the course of his examination, “being interrogated for the pursuer, If both parties fairly settled the balance due by the deponent on the attested account? he “deponed, That they did; and that he paid the balance.” On this ground

The defender *pleaded*: The pursuer, by putting the above question, referred to the defender’s oath the existence of the debt, which his negative answer has disproved.

Answered: Reference to oath of party being a judicial act, has effect no farther than the authority which is essential to it extends;
T Bankton,

Bankton, b. 4. tit. 32. § 9.; Falconar, 8th July 1749, Elliot *contra* Ainflie and Porteous. Here was no authority, but for examining the party as a *haver*.

The Lord Ordinary found, That “ various questions had been
“ put to the defender when examined as a haver, which were only
“ competent to be put to him if he had been examined as a party,
“ and which he therefore might have declined to answer ; and that
“ the answers he has made to such questions cannot have the force
“ of an oath of party, there having been no previous judicial refe-
“ rence.”

To that judgement, (it being observed, that artifices of this kind appeared to be multiplying in practice, and ought to be checked), the Court adhered.

Lord Ordinary, *Dreghorn*.
Clerk, *Menzies*.

A. S. Elliot.

Alt. J. Clerk.

S.

N^o XLIV.

November 16. 1788.

PATRICK RIGG, and others,

AGAINST

GEORGE PATERSON and CHARLES BELL.

CAUTIONER.—*Action sustained against a cautioner, after his bond had been given up and cancelled.*

RIGG, and the other heritors in the parish of Cupar of Fife, having employed a person to rebuild the parish-church, Paterson and Bell granted a bond, obliging themselves, as cautioners, that the work should be properly executed.

When the building was finished, it was examined by two tradesmen appointed by the heritors, and they having declared their opinion that the builder had fulfilled the conditions of his bargain; the heritors, after making payment to him of a small balance then due, gave up the bond to the cautioners, by whom it was cancelled.

It soon appeared, however, that the report of the two tradesmen was exceedingly erroneous, the walls of the church, from an improper construction of the roof, being in imminent danger of falling
afunder.

afunder. The builder himself having become insolvent, Rigg, and the other heritors, brought an action against the cautioners, who, in defence,

Pleaded: A cautionary engagement in the law of Scotland is merely *literarum obligatio*, which derives its whole efficacy from the subscription of the cautioner. If therefore he has not subscribed at all, or if his subscription has not been accompanied with all the statutory forms, this circumstance, though originating in mere inattention, will be fatal to the obligation. In the same manner, if a cautionary bond, however regularly executed, has been cancelled with the deliberate consent of the creditor, it cannot be made the foundation of any effectual action; and this, agreeably to the rule, *Quod unumquodque eodem modo dissolvitur quo colligatum est*. It is expedient, that cautionary obligations should be confined within the narrowest bounds, otherwise they would be attended with such danger, as would altogether preclude their use. Hence, a cautioner having subscribed a bond of corroboration, which, owing to the inaccuracy of the writer, contained no obligation for repayment of the sum lent, was found to be free. And in a later case, where the manager of a banking-company had been induced, in consequence of an erroneous statement of accounts, to give up a bond signed by two persons as cautioners in a cash-credit, it was solemnly decided, that although it was still competent to sue the principal debtor, no action could be sustained against the cautioners; 2d June 1749, Colt *contra* Angus; January 1784, George Home *contra* Archibald Malcolm and Thomas Stodhart.

Answered: In the constitution of a cautionary obligation, it seems to be established in practice, that nothing less than a written instrument, deliberately and formally executed, can be admitted. But after it is once properly constituted, this agreement must undoubtedly subsist, like every other, until it has been fulfilled by specific performance, or until it has been done away by another agreement, to which no objection, arising from the fraud or error of one or other of the contracting parties, can be stated. If a bond granted by a cautioner has been by any accident destroyed, it will not be said, that it may not be restored in an ordinary action for proving the tenor. And in the present case, as the cautioners could not have been allowed to avail themselves of their own fraud in getting up their bond before the work was properly executed, no reason can be given, why they should be permitted, for the same purpose, to avail themselves of the fraud or fault of another. The decisions quoted do not support a contrary doctrine. In that of Colt *contra* Angus, there was an essential defect in the original agreement; and in the other, which has not been collected, some peculiarity must have occurred, which made room for an exception from the general rule; 5th February 1703, Gordon *contra* the Heirs of Johnston of Polton.

It was farther contended for the defenders, That, at least to the extent

tent of the sums paid to the builder after the erroneous report of the tradefinen appointed by the heritors, the claim should be disallowed. This circumstance, however, had no weight with the Court, no precaution of this sort having been stipulated in the bond granted by the cautioners.

“ The Lords found the cautioners liable.”

Reporter, *Lord Dreghorn.*
Gordon, Clerk.

Act. Blair.

Alt. Wight.

C.

N° XLV.

November 18. 1788.

JACOBINA REID,

AGAINST

KATHERINE, ELISABETH, &c. WOODS.

SERVICE OF HEIRS.—*A Precept of Clare constat equivalent to a special service. The character of the heir must in both be distinguished with equal accuracy.*

JAMES WOOD and Euphan Selcraig were infeft in a small piece of land held of a subject-superior, and destined “ to them, and “ longest liver of them, in conjunct fee and liferent, and to the “ heirs lawfully procreate betwixt them in fee; which failing, to the “ said James Wood his nearest heirs and assignees whatever.”—Of the marriage between these parties, there existed a son and four daughters.

After the death of James Wood, his son obtained from the superior of the lands a precept of *Clare constat*, whereby, on the narrative, “ that by authentic documents and instruments shown and produced, “ it clearly appeared that the deceased James Wood, father of John “ Wood, bearer hereof, died last vest and seised in all and whole “ that tenement of lands, &c. and that the said John is only son, and “ nearest and lawful heir to the deceased James Wood, his father, and that “ he is of lawful age,” &c. therefore the superior grants warrant to his bailies, “ to give heritable state and seisin of the foresaid tenements, to the said John Wood, as the nearest and lawful heir to the “ said James Wood, his father.” In virtue of this precept, John Wood was infeft.

John

John Wood was married to Jacobina Reid, to whom he conveyed the lands which had belonged to his father. After his death, an action having been brought by her against Katharine Wood, and the other sisters of her husband, who had continued in possession of the lands, an objection was stated to her title, as flowing *a non habente*, on this ground, that the lands having been destined *to the heirs of the marriage between James Wood and Euphan Selcraig*, the precept of *Clare constat* obtained by John Wood, as *only son and nearest and lawful heir to his father*, was inept. In support of this objection, it was

Pleaded: The method of transmitting feudal property from the dead to the living, by precept of *Clare constat*, arising solely from the unauthorized act of a private person, is in its nature anomalous, and ought to be confined within the narrowest bounds.

At first, this form was only used in the case of the lineal succession; and before the beginning of the present century, very few instances perhaps will be found of its having been extended to any other. In tailzied fees, where the most intricate questions frequently occur, it ought never to be resorted to, but the right of the heir should be established in the regular manner, by a service and retour, carried on under the authority of a competent judge, and ascertained by the verdict of a jury.

But even although the use of this form were to be admitted in every case, it never can be thought sufficient for transferring property, where a service in the same terms would be unavailing. And as a service of one, as *nearest and lawful heir*, which is the same with *heir of line*, or *heir-general*, cannot carry any subject devised to heirs of a marriage, or to those of any other character, not marked out by the law, but by settlement, the infestment which took place in the person of John Wood must be of no effect.

It is true, that where the character, under which an heir has been served, and that in which he ought regularly to have been served, cannot exist in two different persons, as in the case of a son served heir in general to his father, in order to take up subjects destined to his father's heirs-male, the same strictness does not appear to have been always kept up. But under this exception, the propriety of which may be justly called in question, as introducing uncertainty in the transmission of land-rights, the present case cannot be included. Here, John Wood has indeed been declared to be *the only son of his father*. He is also declared to be *his father's nearest and lawful heir*. Still, however, it was possible, that the character of *heir of the marriage between his father and Euphan Selcraig*, might have belonged to another person. Although an *only son*, John Wood might have been the issue either of a prior or a later marriage. And in the same manner he might have been *the nearest and lawful heir to his father*, though born of a different mother.

Had the superior even gone so far, as specially to mention the standing investitures which were destined to the heirs of the marriage, and also to declare, that John Wood was *nearest and lawful heir*, with-

out adding "of provision," or "of the marriage between James Wood and Euphan Selcraig," it would not have been sufficient. From this, the meaning of the superior might have been guessed at; but still it would not have been expressed in those terms which the law requires, and which in solemn deeds, such as a precept of *Clare constat*, are indispensable. *A fortiori* in the present case, where no mention is made either of the particular destination in the investitures, or of that character in which alone the heir was intitled to demand a renewal of them, and where it is not even said that he is nearest and lawful heir in the lands formerly specified, the investment following on the precept can be of no avail. The only addition which could be made so as to render the transference complete, would be by annexing to the words "nearest and lawful heir," those "of tailzie and provision," which would entirely change their nature and effects, and therefore never can be supplied by implication; Craig, lib. 2. Dieg. 3. § 29. lib. 2. Dieg. 17. § 22.; Stair, book 3. tit. 4. § 33.; Bankton, book 3. tit. 5. § 19. 59. book 3. tit. 4. § 29.; Erskine, book 3. tit. 8. § 74.; Dict. voce Representation, 21st July 1738, Edgar *contra* Maxwell; 12th June 1752, Landale *contra* Landale.

Answered: The renewal of the investiture, after the death of the vassal, having been at first entirely voluntary on the part of the superior, the form of entering heirs by precept of *Clare constat* seems quite congenial with feudal principles. And there seems to be no reason for confining its use to the case of the lineal succession. In tailzied fees, which are the united work of the superior and vassal, it is equally proper, that the superior should, in this manner, acknowledge those successors to his vassal whom he has previously chosen, by granting the fee under a particular destination, as that in ordinary cases he should, by his own act, admit those who are now, by the provision of the law itself, called to the succession.

There is however no occasion for resorting to any arguments of this sort, this mode of entering heirs having been indiscriminately practised in every instance where lands are not immediately held of the Crown, but of a subject; and the words here used for this purpose, being those which have been uniformly employed, seem to be fully adequate. When the superior sets forth, That "he had seen, by authentic documents, that the former vassal was vest and seised in the lands;" it is the same thing as if he had said, That he had considered the last investitures, destined as they were, to the heirs of the marriage between James Wood and Euphan Selcraig: And when he farther proceeds to say, that John Wood was the *only son of his father, and his lawful and nearest heir*, his meaning is equally evident, that John Wood was *heir* according to the investitures, or in other words, that he was the *lawful heir* under those investitures; the words, "nearest and lawful heir" being applicable, *secundum subjectam materiem*, to heirs of every denomination, to the heir of conquest, of tailzie, and provision, as well as to the heir of line.

That strictness of construction, which seems to have been adopted in the cases mentioned on the other side, might be proper in general services,

services, which refer to no particular settlements, and which are intended merely for affixing a certain character to an heir: but in the case of special services, to which a precept of *Clare constat*, from its reference to the last investitures, bears more resemblance, the same rule has not been followed. Thus, where the investitures of an estate stood limited to heirs-male, a special service by the eldest son of the last proprietor, as *legitimus et propinquior hæres*, was found equivalent to a service as *heir-male*. And in another case it was decided, That a general retour, in the same terms, carried right to a provision devised to the heirs-male of a marriage; although it is evident that those characters might have belonged to different persons: But it was thought sufficient that, in the case as it stood, both did actually coincide in the same person; Craig, lib. 2. Dieg. 7. § 25.; Stair, b. 3. tit. 5. § 26.; 13th November 1712, Earl of Dalhousie *contra* Lord and Lady Hawley; 13th December 1705, Levington *contra* Menzies; 22d January 1706, *inter eosdem*.

A separate objection was stated to the validity of the precept of *Clare constat*, that the devise of a tenement of so little value as that in question, to the *heirs* of a marriage, should be held as admitting the whole children equally. But this argument was entirely disregarded; the Court being of opinion, that in destinations of landed property, how insignificant soever, the eldest son, agreeably to the course of intestate succession, was to be preferred, unless where a contrary intention was clear.

The Lord Ordinary “over-ruled the objection to the precept of “*Clare constat*.”

And after advising a reclaiming petition with answers, the Court affirmed that judgement.

But a second reclaiming petition having been offered, which was followed with answers,

The Lords altered the former interlocutors, and found, “That the precept of *Clare constat*, and investment thereon, in the person of John Wood, was inept, and could not carry the right of the subjects in dispute; and therefore absolved the defenders.”

Lord Ordinary, *Monboddo*.
Menzies, Clerk.

Ast. *Maccormick*.

Alt. *Mackintosh*.

C.

N^o XLVI.

November 21. 1788.

DUKE of ARGYLE, and his TACKSMAN,

A G A I N S T

FEUERS of SHEARDALE.

IMPLIED OBLIGATION.—*Coal having been reserved in a feu of lands, whether surface-damages be due to the feuer, though not stipulated.*

IN a precept of *Clare constat*, granted by the family of Argyle in 1679, in favour of the heir of a feuer of their lands of Sheardale, the following reservation of coal was inserted, and it was repeated in the after deeds of transmission: “ Et reservando nobis, nostrisque
“ prædict. omnes carbones et carbonarias dict. terrarum, cum liber-
“ tate nobis fodiendi carbones in aliqua parte dict. terrarum, excep-
“ tis domibus et ædificiis desuper ædificat. et ædificand. ac hortis et
“ pomariis desuper existen.”

In 1740, when, for the first time, coal-pits were dug in the grounds, or the surface occupied by coal-hills, the lessee of the coal agreed to make some compensation on that account to the proprietor of Sheardale, as succeeding lessees likewise did; and in some instances the proprietor's claim was enforced by the sentence of the Sheriff. But the Duke of Argyle was not a party either to the transactions or to the law proceedings. It appears, however, that in a late instance the Duke had taken the tacksmen of his coal bound to pay to his tenants and vassals such surface-damages as might be warranted by the tenor of the feus and leases, or by law.

The Duke and his tacksmen having brought an action of declarator of immunity from that claim of indemnification, they

Pleaded: The reservation of a right to work coal is the same in effect as a new grant of that right, which would plainly imply every power necessary for the exercise of it; *omnia sine quibus explicari nequit*. Damages then cannot be due on account of such exercise. That claim would suppose something done contrary to right; and, if it were well founded, the consequence would be, that the pursuers had no right to this coal; whereas the existence of that right is admitted. The inconsistency here is the same as if the subject of the reservation had been a right to feal and divot, or to a road, and indemnification notwithstanding were then demanded.—Besides, the power of digging pits, *fodiendi*, is expressly given; and the exception of houses and gardens, where the damage would be greatest, denotes that less da-
mage

mage was not to be considered.—No decision of the Court contrary to this plea has been pronounced, though in the case of a lease of lands the tenant has been found intitled to surface-damages. For he having, by his lease, an express right to all the surface, for every part of which, indiscriminately, the rent was to be paid by him, it was thus implied, that without indemnification he could not be deprived of the use of any part.

Nor are the trivial concessions of former tacksmen, whose motives cannot be certainly known, nor their chusing to decline litigation, matters in which the family of Argyle had no participation, to be understood, to change the nature of the right, still less by prescription to establish an opposite one. As to the obligation lately laid on the tacksmen of the coal, it is a mere hypothetical stipulation, *ob majorem cautelam*, which by no means imports any acknowledgement of the justice of the claim.

Answered: The maxim, that whatever is essential to the exercise of a right must be held as accompanying it, is fully admitted, when the pursuers title to dig coal-pits, and to perform the other requisite operations on the defenders grounds, is acknowledged. But it cannot thence follow, that the damage done by the means employed for exercising the right ought not to be repaired. The maxim demands that only which, if with-held, would operate to the annihilation of the right granted; but here the right to coal is as fully exercised, when indemnification of the surface-damage is made, as if it were denied.

Though no decision on the point in question with respect to vassals appears, it has been determined in regard to tenants, they having been found intitled in such cases to surface-damages; Stair, 15th February 1668, Colquhoun *contra* Watson; Fac. Coll. 21st June 1768, Smith *contra* Hamilton Macgill. Nor does it seem reasonable to ascribe so much as has been done, to the distinction between an express or conventional reservation in the case of vassals, and a presumed or legal one in that of tenants. In liferented lands the law gives to the proprietor the sole right to coals or other minerals; but surely the liferenter would not be denied reparation of the damage thence arising. In like manner, when in the division of a commonity mines and minerals are reserved to the proprietor, it is understood that he must make compensation for the loss of surface thereby occasioned. Such indemnification as that now claimed, is believed to be universally granted; nor otherwise, in small properties especially, could the working of coal or other minerals be reserved without absurdity, the right granted being thus subject to annihilation at the pleasure of the granter. For here the pursuers maxim may be retorted on themselves.

The actual payments by the tacksmen, sometimes judicially compelled, are not to be presumed as unknown to the Duke; while the stipulation in the tacks seems an open recognition of the claim.

The Court, on the Lord Ordinary's report, found, " That the
" pursuer had a right to work the coal under the lands in question,
X " in

“ in terms of the reservation in the feu-rights granted by him or his
 “ ancestors, without being liable in damages to the defenders or their
 “ tenants, occupiers of the surface.”

Afterwards a proof of the practice having been allowed and taken, the cause was again reported, when a majority of the Judges deemed the proof inconclusive. Yet, as the Bench was divided on the general point, it is by no means clear, that the circumstance of usage had not an influence on the subsequent determination, by which

The Court sustained the defences, and assailed the defenders.

Reporter, Lord Hailes. A&C. Advocate, Craig. Alt. Dean of Faculty, Rolland, J. Erskine.
 Clerk, Home.

S.

N^o XLVII.

November 19. 1788.

SAMUEL OMEY,

AGAINST

JANET MACLARTY.

IMPLIED CONDITION.—PROVISIONS TO HEIRS and CHILDREN.—*A provision to a grandchild made payable on the grandchild's marriage, or attaining a certain age, lapses by his dying before that period unmarried.*

JAMES CRAWFORD, by a trust-deed, settled on Archibald Omev, his grandson by a son deceased, L. 600, “ declaring, That the interest should be regularly paid to him from the first term of Whitsunday or Martinmas after the granter's decease, to his (Archibald's) majority or marriage, whichever of these should first happen, *when the principal sums were to be paid by the trustees, and not sooner.*”

Archibald Omev having died before his majority unmarried, and the money being claimed by Samuel and Mary Omev, his brother and sister, as his next of kin, Janet Maclarty, and other executors of Mr

Mr Crawford, who opposed this claim, contended, that the provision had *lapsed* by the death of the grantee, and

Pleaded: Though in proper *bonds of provision*, those granted by a father to his children, *provisions* made payable on the children's attaining a certain age, being intended for answering their occasions at that period, become ineffectual, if they shall die before it; yet the constitution of a legacy is understood to be independent of the term of payment. By the legatee's survivorship the legacy *vests*, and the adjunction of a term of payment serves only to postpone the time at which he or his heir is intitled to claim possession. Such, in conformity to the Roman law, was the decision of the Court, in the case of Burnetts *contra* Forbes, Fac. Col. 9th December 1785. Now the sum in question is to be considered as a legacy, and not as a provision to a child; the granter not being the father but the grandfather. Besides, the interest having been immediately payable, the principal sum itself must of consequence have likewise been due.

Answered: As the above admission proceeds on the supposition of bonds of provision granted by a father being the just consequence of a natural obligation, so the same obligation lying on grandfathers in their order, it is evident that there can be no distinction between that case and the present. As to the interest being due in the mean time, this was evidently a separate provision, and distinguished from that which was contingent on the event specified.

The cause was taken to report, a number of other questions having occurred on the construction of Mr Crawford's settlements; when

The Court seemed to admit no distinction between the cases of a father and of a grandfather settling provisions on his children or grandchildren. Some of the Judges too doubted the propriety of distinguishing between legacies and provisions to children, holding the rule of the Roman law as equally applicable to both, that *dies incertus pro conditione habetur*.

The Lords found, "That as Archibald Omey died before majority or marriage, the sum of L. 600 provided to him lapsed, and did not transmit to his nearest in kin."

Reporter, Lord Hailes. For Omey, Wight. Alt. Macleod-Bannatyne. Clerk, Menzies.

S.

N° XLVIII.

December 4. 1788.

ALLAN, STEUART, and COMPANY,

A G A I N S T

CREDITORS of JAMES STEIN.

FRAUD.—*An insolvent person having purchased goods on credit, within three days preceding his bankruptcy, such purchase presumed in law to be fraudulent.*

MOVEABLES.—*Delivery brevis manus.*

ON 31st October 1787, Allan, Steuart, and Company, corn-dealers, entered into an agreement with Stein, a distiller, by which they engaged to purchase for, and furnish to him, as much grain as he should have occasion to consume in his distillery, for the price of which, on the other hand, he was to grant bills. Stein then, though reputed as in good credit, was in reality insolvent; and on 23d February following he stopped payment. During the intervening period, continually, down to the day of the bankruptcy, quantities of grain, to the value of L. 20,000, had been furnished according to the contract, but none of the bills of lading were transmitted later than 4th February.

Immediately after Stein's failure, Allan, Steuart, and Company, preferred a petition to the Court, stating, That by concealment of his insolvency he had fraudulently got possession of their property, and therefore craving restitution, so far as the grain was still extant in Stein's custody. To this claim Stein's other creditors objected, and (the Court having appointed the matter to be argued in informations),

Pleaded: If the claimants, by the bankruptcy of the debtor, have suffered loss, their fate is the same as that of all his other creditors, whose misfortune any interval of time between the credit given and the subsequent bankruptcy can never alleviate. Their pretended preference then has not equity for its basis: Nor does the circumstance of the goods being still in existence, found this restitution in law.

By the sale and delivery the property was completely transferred: the sellers right of *rei vindicatio* ceasing, and they in lieu of it becoming personal creditors for the price. The maxim of law no doubt is, that *dolus dans causam contractui, reddit contractum nullum*; and there

was

was a time when the insolvency of a purchaser was held by the Court to constitute such *dolus* as to annul the sale; as in the case of Prince *contra* Pallet, 22d December 1680, Stair. But that idea is truly inadmissible in a commercial country, where it must often happen, that the fairest traders owe their prosperity and opulence to perseverance in maintaining their credit at particular periods, when, by some emergency, they may have become actually insolvent. It was therefore rejected in the case of Sir John Inglis *contra* the Creditors of Cave, 16th June 1736. And from that time downwards it was never understood that the buyer's insolvency alone could void a bargain.

By a subsequent judgement in the same case, indeed, the Court annulled the sale with respect to goods furnished within *three days* preceding the bankruptcy; but the ground of this distinction may be questioned. It is the supposition, that the determination to stop payment must have been made *three days* before that event. No precise time, however, it is plain, can *a priori* be justly allotted for such an interval, the length of which must ever vary according to circumstances, and these frequently the most unforeseen and casual. A general regulation of that kind might no doubt be expedient for saving the expence of legal discussion, in the same manner as that with respect to *the sixty days* antecedent to bankruptcy, during which period no valid deed can be done in favour of any particular creditor. But such regulations are the province of the legislature, not of courts of law; and hence arose the necessity of the statute of 1696. Among the numerous instances in which the Court has decreed restitution of goods sold and delivered to persons who had afterwards become bankrupt, this judgement respecting the *triduum* has not been regarded as a precedent. Nor is any similar rule known in the practice of other countries, as of England, for example, or of Holland.

At the same time it is to be observed, that as bills of lading of the whole goods were indorsed and transmitted to Stein, nineteen days before his failure, there was thus a virtual and legal delivery of the goods prior to the *triduum*. For by the indorsation of bills of lading, an effectual tradition of goods on shipboard is in law understood to be made; See Select Decis. 13th June 1764, Buchanan and Cochrane *contra* Swan; Judgement of House of Peers in Hastie and Jamieson *contra* Arthur, 10th April 1770; Fac. Coll. 2d February 1787, Bogle *contra* Dunmore and Company.

Answered: This claim is founded not only on the fraud of the bankrupt, but on the practicability of restoring goods still extant; an advantage of which the claimants are not to be deprived, because it is not possessed by every other creditor. Nevertheless, as their goods were delivered more on the eve of the bankruptcy than the rest, the fraud with respect to them is more glaring. It has been admitted, that fraud is a legal ground for decreeing restitution after sale and delivery; a proposition which both in general, and likewise as relative to the particular case of insolvency in the buyer, is established by nume-

rous authorities; Stair, b. 1. tit. 9. § 14.; Bank. b. 1. tit. 10. § 60. 117; Erskine, b. 3. tit. 3. § 9.; Princip. of Equity, p. 222.; Dict. of Decif. vol. 1. p. 335. vol. 3. p. 143.; Select Decif. Mackay *contra* Forsyth, 20th January 1758; Fac. Col. 27th February 1765, Crawford Newal *contra* Mitchell; 24th June 1786, Sandeman and Company *contra* Kempt's creditors.

If however it be granted, on the other hand, that mere temporary insolvency is not a legal indication of fraud, the concession will not afford an apology to an insolvent man, purchasing on credit, at a crisis when he can entertain no reasonable expectation of retrieving his affairs. It is possible, no doubt, that supervening bankruptcy may result on a sudden from some accidental or unforeseen occurrence; but as, in the nature of things, that will comparatively but seldom happen, it is a just presumption, when this event closely follows the purchase, that it has been fraudulently in the purchaser's view. In the case of Cave's creditors, the Court held it as a *presumptio juris*, that fraud was committed with respect to goods delivered *intra triduum* of the bankruptcy; a rule which ever since has been considered as established, and in particular, contrary to what is said on the other side, was recognised in the above-cited case of Crawford Newal *contra* Mitchell.

The claimants argue, that thus the Court, by making a regulation not authorised by law, would assume powers of legislation similar to those exercised in the statute of 1696. But it is perfectly agreeable to law, to judge by presumption in default of more complete proof, and here is only one instance, among the many legal presumptions which are still subject to be overthrown by superior evidence. The presumption of the statute referred to, is one, *juris et de jure*, and such as warranting a judgement in opposition to complete evidence, could not but require for its sanction an act of the legislature.

Neither do the cases that have been quoted establish a legal delivery of goods by indorsement of the bills of lading. The judgement of the House of Peers, in that of Hastie and Jamieson, was only to find "a special property" vested in the indorsee, as distinguished from a full transference of the right; and the other instances respect merely grounds of preference among competing creditors.

The opinion of the Court, agreeably to the decision in the case of Cave's creditors, which was considered as an established precedent, was, that a legal presumption of fraud, such as to annul the transaction, takes place with respect to purchases made within *three days* of the purchaser's bankruptcy, on whom therefore, or on those in his right, the *onus probandi* of fair dealing lies; while prior to that *triduum*, it is incumbent on the sellers to support a relevant charge of fraud.

The idea of transference by indorsement of the bills of lading seemed not to be admitted.

"The Lords found the claimants intitled to restitution of the grain delivered by them into the granaries of James Stein, within
" *three*

Dec. 1788.

COURT OF SESSION.

87

“ *three days of 23d February 1788, when he stopped payment, and which then remained in his possession unmanufactured.*”

A reclaiming petition was presented, but being advised with answers, was refused.

For the Claimants, *Refs et alii.*

Alt. Blair, *Maconochie.*

Clerk, *Home.*

S.

N^o XLIX.

December 10. 1788.

WALTER MONTEATH,

A G A I N S T

DAVID CROSSE, and others.

PERICULUM. POLICY OF INSURANCE. — *A vessel warranted to sail with convoy, instead of proceeding to the place of rendezvous, remained in a harbour within reach of the convoy's signals, to which she paid obedience, but was by accident prevented from joining it for several days after sailing. Long after the junction the ship being captured, the underwriters, from failure of the warranty, were found free.*

CROSSE and other underwriters subscribed a policy of insurance, “ assuring, in favour of Monteath, certain sums on goods aboard of the Anna at Jamaica, in the voyage from that island to the river Clyde; the Anna being thereby warranted to sail with convoy on or before 1st August 1782.”

Without proceeding to Bluefields bay, the appointed place of rendezvous prior to joining the convoy, the vessel lay in the harbour of Savannah-la-Mar, at the distance of several miles, but not out of the reach of signals from thence. While there, the Captain received failing orders from the Admiral who commanded the convoy.

On 25th July, by a very peculiar accident, a land-breeze sprung up in the day-time, of which the fleet taking advantage, set sail; but before the Anna, though completely ready, could clear the harbour, she was stopped in her course by a sudden calm. She joined the fleet however on 29th, and continued with it till 16th September, when it was dispersed by a storm. Afterwards she was captured by the enemy, and carried into France.

The

The insured values being demanded, they were refused on this ground, that the warranty in the policy, "of sailing with convoy," had not been fulfilled, as the ship did not in fact join it for several days after sailing.

In an action, however, at the instance of the insured, removed from the Court of Admiralty into the Court of Session, the pursuers

Pleaded: The warranty was truly complied with. The ship lying within sight and hearing of signals, had received sailing orders, and as soon as the signal for unmooring was given, being quite ready to put to sea, she was proceeding to join the convoy, when, in circumstances hardly less extraordinary than if an earthquake had happened, for land-breezes in the day are equally rare, she was suddenly arrested by a calm. Her having thus commenced the voyage by setting out to join the convoy, which by a fatality only, she was prevented from effecting, it is to be deemed equivalent to an actual junction at that time. So in England this matter has been frequently determined. Millar on insurance, p. 528, Phynne *versus* Webster. Douglas, Rep. p. 344, Bond *versus* Nutt; ib. 350, Thelluson *versus* Fergusson; Strange's Rep. p. 1290, Victorine *versus* Cleeve.

Though any wilful deviation from the course of the voyage insured, as being contrary to an implied warranty, voids the policy, yet the non-compliance supposed in this case ought not to have that effect; because not only was it altogether casual and involuntary, but such as evidently could have no possible influence on the situation of the ship at the time of the capture, she having been exactly under the same protection of the convoy, as if she had joined it on the 25th instead of the 29th of July.

Answered: It has been admitted, that the Anna did not join the fleet at the place of rendezvous. Of course she did not, in terms of the warranty, sail along with the convoy. Whether this failure was owing to pure accident or to fault, or whether it had any actual influence on the fate of the adventure, is of no consequence; to void the policy, it is enough that thus the warranty was not complied with. "It is perfectly immaterial (to use the words of Lord Mansfield) for what purpose a warranty in a policy of insurance is introduced; but being inserted, the contract does not exist unless it is literally complied with. There is a difference between a hypothetical and a conditional contract: the latter admits of equity; and where it cannot be performed literally, may be performed as nearly as possible. But in a hypothetical contract like this, if the event does not happen, there is no agreement." Park on insurances, p. 363. 368. 391.; Fac. Col. 27th June 1786, Dunmore and Company *contra* Allan. In all the cases quoted on the other side, except the case of Victorine *versus* Cleeve, the voyages had been commenced after a previous junction at the place of rendezvous; and in that particular one where there was no appointed rendezvous, the ship had actually failed to meet her convoy. It is besides to be remarked, that the alledged fatality would not have happened to the Anna, if, as she ought, she had joined the other ships at Bluefields.

The

The Judge Admiral having decerned in absence against the underwriters,

The Lord Ordinary “suspended the letters *simpliciter*.” And on advising a reclaiming petition and answers,

The Court adhered to the interlocutor of the Lord Ordinary.

A petition reclaiming against this judgement was appointed to be answered, but afterwards refused.

Lord Ordinary, *Braxfield*.
Clerk, *Home*.

A&S. *G. Fergusson*, Refr.

Alt. *Blair*.

S.

N^o L.

December 14. 1788.

ELISABETH DALZIEL, and her *Tutor ad litem*,

AGAINST

ROBERT DALZIEL.

ALIMENT.—*How long due.*

IN a question between these parties, it had been determined, that the defender, who had succeeded to his father in an opulent family-estate, was obliged to maintain the pursuer, his niece by an elder brother, deceased.

The next question was, How long this alimony should continue; the defender contending, that it ought to cease as soon as the pursuer was able to earn her living, by her own industry.

The Lords, however, found, That, in the circumstances of this case, “the pursuer was intitled to L. 30 *per annum* during her life, or till “her marriage.”

Lord Reporter, *Monboddo*.
Clerk, *Home*.

A&S. *M. Refr.*

Alt. *Honyman*.

C.

Z

N^o LI.

N^o LI.

December 17. 1788.

[TEIND-COURT.]

The COMMON AGENT in the Locality of KIRKLISTON,

A G A I N S T

ALEXANDER GIBSON WRIGHT.

TEINDS.—In localling a minister's stipend, those possessing the teinds of the lands by tacit relocation from the Crown, as coming in the place of a Bishop, are considered as having an heritable right.

MR Gibson Wright, and his predecessors, had held the teinds of their lands of Clifton-hall, in the parish of Kirkliston, for more than a century, under leases granted by the Crown, as coming in the place of the Archbishop of St Andrew's.

One of these leases expired in 1783. And while Mr Gibson was continuing to possess the teinds of his lands by tacit relocation, an action was, in 1785, brought for augmenting and localling the stipend due to the minister of the parish. In 1787, Mr Gibson Wright obtained a new lease for nineteen years.

The common agent in the locality insisted, that Mr Gibson Wright was to be classed among those who had no heritable right to the teinds of their lands : and

Pleaded : In determining out of what fund the stipend due to the minister is to be paid, the rule in general is, to exhaust those tithes which are still in the hands of the Crown or other titular, before encroaching on those which are under lease. And the reason is, that the titular being at common law obliged to guarantee the tacks granted by him, and the tacksmen of the tithes being also intitled by the statutes of 1617 and 1690, in recompence of any allocation, to demand a prorogation of their tacks ; a contrary practice would give rise to many unnecessary proceedings. This principle, however, does not hold with regard to tithes held by tacit relocation, the holders having no claim to any recompence. There is no instance where a tackfman, in such circumstances, ever thought of demanding it.

And it is of no importance, that where the titularity of the tithes, as happens in the present case, is in the Crown, as coming in the place of a Bishop, the landholders may, by the usage of Exchequer, obtain from time to time new leases of the tithes exigible from them, on pay-
ing

ing a certain fine or composition. As this arises from no positive right, seeing a renewal of former leases may always be, and is sometimes with-held, it cannot be made the foundation of any general rule.— Indeed the case would not be altered, although those who are liable in payment of tithes to the Crown, might *de jure* insist for a renewal of former leases. The allocation of stipends must be regulated by the situation of parties when the action is commenced, agreeably to the maxim, "*Quod pendente lite nil innovandum.*" Without this there would be no end to disputes, and the state of a locality would ever fluctuate as the rights of the several landholders varied: alike contrary to the established practice, and to the directions given to the Commissioners for Plantation of Churches, to settle what, *in all time coming*, shall be the stipend of each minister.

Answered: A titular can in no case lay any burden on those who are in possession of the tithes of their lands, in virtue of standing tacks, however short the endurance of these may be, while there are free teinds in the parish. The only difference arising from this circumstance is, where from a deficiency of the free teinds it becomes necessary to impose some part of the stipend on those who have tacks; in which case, the longer the current lease is, the lessee will be intitled to a longer prorogation.

The present case, however, is attended with peculiar circumstances. Besides the right to possess the tithes, founded on tacit relocation, which may continue for centuries, the tacksmen are intitled, by the custom of Exchequer, to obtain a new lease for nineteen years, and so on from one period of nineteen years to another, *in infinitum*. To make a distinction in such a case, between those who have recently obtained a lease of the tithes, and those who have not, would be obviously unjust. And the rule *pendente lite*, is quite inapplicable, the other heritors having no more right to object to the granting of a new lease, before the locality of the stipend is finally ascertained, than they have to prevent one of their number, after the commencement of an action of this sort, from purchasing, under the statutes of 1690 and 1695, the tithes of his lands, on payment of the statutory price.

The interlocutor of the Lord Ordinary was in these terms:

" Finds, That as a tenant, who, after his tack is expired, possesses
 " on tacit relocation, is liable in all the payments and prestations
 " therein contained, and not as a possessor would be, who had no
 " antecedent title, he ought to be considered as a tacksmen even after
 " his tack is run out: Finds, That Mr Gibson Wright, and his au-
 " thors, possessed their teinds in virtue of tacks from the Exchequer
 " very far back, and that he obtained one in 1764, which expired
 " at Martinmas 1783, and that, by the custom of Exchequer, he
 " was intitled to a renewal thereof, and would have obtained it in
 " 1783, had he then applied for it, in the same way as he got it in
 " 1787 when he did apply for it: Finds, That as Mr Gibson Wright
 " possessed

“ possessed his teinds by tacit relocation in consequence of the tack
 “ 1764, when the process of augmentation was raised, he must be
 “ considered as a tackfman of the teinds at the time; and that his
 “ case cannot be assimilated to that of an heritor having no right to
 “ his teinds when a process of augmentation was raised, and obtain-
 “ ing an original tack of them after the augmentation was granted;
 “ and that the maxim, *pendente lite*, does not strike against Mr Gib-
 “ son Wright’s right of tithes in virtue of his tack 1787,” &c.

After advising a reclaiming petition for the common agent in the locality, with answers for Mr Gibson Wright, the Lords affirmed the judgement of the Lord Ordinary.

A second reclaiming petition was preferred, which was refused without answers.

Lord Ordinary, *Dreghorn*.

For the common agent, *Wight, Murray*.

Alt. *Mat. Refs.*

C.

N^o LII.

December 24. 1788.

ROBERT PLAYFAIR, and others,

AGAINST

WILLIAM WALKER, GEORGE MAWER, and others.

BANKRUPT.—Act 23 Geo. 3. c. 18. *Monies recovered by a factor on a Sequestered Estate, where to be deposited.*

THE estate of a merchant in Dundee having been sequestered, and William Walker and George Mawer chosen factors, it was resolved by a majority of the creditors, That the sums recovered by them should be lodged in the hands of one or other of six merchants in Dundee, who were in use, in the same manner as bankers do, to take up money on promissory-notes, but who could not, properly, be said to carry on the business of banking.

The reason of this proceeding was, that there was no banker or banking-company in Dundee, who would give any thing for the use of money so deposited. And the greatest part of the creditors, and almost

almost the whole effects falling under the sequestration were in the neighbourhood of that town.—Playfair, however, and other creditors, complained to the Court of Session, and

Pleaded: That the money recovered out of a bankrupt-estate may be properly secured for the creditors, it has been provided, that it shall be lodged “in a bank or banking-house, or in the Royal Bank or Bank of Scotland.” A depositation, therefore, in the hands of any individual, though he may carry on the banking business, and *a fortiori* the placing of it in the hands of a person who cannot, with any propriety, be called a banker, is contrary to the words of the enactment; and, in many instances, might be attended with mischievous consequences.

Answered: The purpose of the legislature certainly was, That the money belonging to sequestrated estates should be intrusted to those persons only whose responsibility is so much the object of general attention as, in a great measure, to preclude the hazard of an improper choice. The circumstance of carrying on the banking business in partnership seems of no importance; nor does it appear that any exclusion was meant of persons who carry on an extensive trade, and who, by the trust which they uniformly receive of money on their promissory notes, appear to be as much possessed of the public confidence as any banker can be. In the present case, the choice of those who are chiefly interested, influenced by reasons of common utility to all, ought to preponderate, if the words of the enactment can admit of any doubt.

The Court did not precisely determine, whether, in such cases, money could be deposited in the hands of an individual carrying on the trade of a banker: but it was thought, that the persons suggested by the creditors, not being bankers, the resolution complained of was unauthorized by the statute.

The Lords found, “That the lodging of the money in the hands of the persons mentioned in the complaint was not warranted by the statute; and decerned accordingly.

For the Complainers, *Dean of Faculty.*

Alt. W. Miller.

C.

A a

Nº LIII.

N° LIII.

January 13. 1789.

TRUSTEES of HENRY GREIG,

A G A I N S T

JOHN DAVIDSON.

PACTUM ILLICITUM.—*How far a Scotsman carrying on trade abroad has action in this country for the price of contraband goods.*

GREIG, a Scotsman, who was settled as a merchant at Gottenburg in Sweden, shipped, in consequence of the commission of Davidson, a quantity of tea and other prohibited goods, on board of a vessel bound for the coast of Buchan in Aberdeenshire. Greig himself paid the freight; which was so far above the ordinary rate, that the excess appeared to be a compensation for the risk attending a smuggling voyage; and in the bill of lading which he took from the shipmaster, the hazard of seizure, as well as that of the sea, was excepted.

An action having been brought against Davidson for payment of the goods, he pleaded in defence, That as the pursuer was a native of this country, though residing abroad, he was in a different situation from that of a foreign merchant; insomuch that the degree of participation in the smuggling adventure, which was apparent from the circumstances mentioned above, precluded his right of action.

The Lord Ordinary, in a process of advocacy, affirmed a sentence of the Judge-Admiral repelling the defence; and the Court, on advising a reclaiming petition and answers,

Adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition however having been presented, the Court expressed doubts of the preceding judgement, and appointed the petition to be answered; but in the mean time the dispute was compromised by the parties. A similar question was afterwards determined in the case of the Attorney of James Cantley *contra* Thomas Robertson, 11th February 1790.

Lord Ordinary, *Dunfinnan.* A.C. *Abercromby.* Alt. *Hay, Macconochie.* Clerk, *Home.*

S.

N° LIV.

N^o LIV.

January 14. 1789.

JAMES RICHMOND, and others,

A G A I N S T

TRUSTEES of CHARLES DALRYMPLE.

PROOF.—BANKRUPT. Act 1696. *Other proof of a bankrupt's imprisonment in terms of the statute, besides the messenger's execution, admissible.*

AN assignation by a debtor, in favour of the trustees of Dalrymple, one of his creditors, was brought under reduction by Richmond and others of his creditors, as having been executed within sixty days of his bankruptcy, contrary to the statute of 1696, cap. 5.

To establish the debtor's bankruptcy in terms of the statute, the pursuers adduced a parole-proof, of his having been repeatedly apprehended by messengers during the sixty days, but without being imprisoned or detained in their custody.

The defenders *pleaded*: The execution of a caption is an *actus legitimus*; of which no other evidence can be admitted than a regular and formal document; Dirleton, 12th November 1667, Duke and Dukes of Buccleugh *contra* Scott; Forbes, 25th June 1714, Hafs-well *contra* Magistrates of Jedburgh; Dict. of Dec. Fountainhall, 24th March 1685, Glendining *contra* Glendining. On this principle, and not on the ground stated in the Faculty Collection, was determined the case of Maxwell *contra* Gibb, 17th November 1785.

Answered: Where certain forms are prescribed for giving validity to any legal deed; as the instrument of a notary in feifins, and perhaps too in the consignation of redemption-money, or as the *execution* of a messenger in poindings; these being requisite steps of procedure, are indeed indispensable. But the statute of 1696 has not required, as a solemnity or necessary form, the execution of a messenger. The facts therefore on which that enactment proceeds, may be proved *prout de jure*; nor does any of the cases quoted by the defenders exceed the bounds of the above admission. Their ill-founded idea of the decision, Maxwell *contra* Gibb, is acknowledged to be contradicted by the report of the case.

The Court expressed an unanimous opinion, That there was no ground for supposing the execution of a messenger as essential to the
proof

proof of the facts respecting a bankrupt's imprisonment, which might be equally well established by parole-testimony. But as in this case that evidence was deemed inconclusive, the circumstances proved not amounting to imprisonment in the sense of the statute more than in the case of Maxwell and Gibb,

The Lords adhered to the Lord Ordinary's interlocutor, affoilzieing the defenders.

Lord Ordinary, *Stonefield*.

Aff. *Tait*.

Alt. *Hay*.

Clerk, *Sinclair*.

S.

N° LV.

January 15. 1789.

JOHN SYME,

AGAINST

DOUGLAS, HERON, and COMPANY.

PRESCRIPTION.—PROOF. HEIR *cum beneficio inventarii*. *How far competent to prove resting owing by the oath of an heir served upon inventory.*

GENERAL GORDON of Kingsgrange employed Mr John Syme writer to the signet as his agent. After the General's death, his heir made up titles *cum beneficio inventarii* to these lands, which were sold judicially.

In the ranking of the creditors, Mr Syme claimed a considerable sum for business done by him for General Gordon. As, however, before any demand was made, more than three years had elapsed from the date of the last article of his account, Mr Syme offered to prove, by the oath of the heir, that the whole was still *resting owing*.

Douglas, Heron, and Company, who were creditors to General Gordon, objected to this claim. And

Pleaded: An heir served *cum beneficio inventarii* is merely a trustee for the creditors of the ancestor, and so cannot be considered as the debtor, to whom, in virtue of the statute of 1579, a judicial reference

rence may be made. A contrary doctrine would be attended with very mischievous consequences, as it would thus be in the power of an heir, after possessing himself of the whole documents belonging to the ancestor, to rear up, in collusion with those who had been formerly creditors to him, many groundless claims.

Answered: An heir served *cum beneficio*, although obliged, in accounting with the creditors of the ancestor, to conduct himself as a trustee, is truly proprietor of the ancestor's estate, in the same way as if he had made up titles without any limitation. In like manner, although he is not liable to the creditors of the ancestor beyond the value of the estate, he is still debtor to them; and to his oath, therefore, a reference may be made in virtue of the statute of 1579. Where the claim, as in the present case, was unprescribed at the ancestor's death, this is evidently just: for the debt of the ancestor having been unpaid at his death, must be understood as still due, if not discharged by the heir.

The Lords were clearly of opinion, That so far as the claim had not undergone the statutory limitation at the decease of General Gordon, the allegation of resting owing might be proved by the oath of the heir, though served *cum beneficio inventarii*.

The Lord Ordinary had disallowed the claim.

But, after advising a reclaiming petition with answers, the Court altered that judgement.

Lord Ordinary, *Ankerville*.

Ast. *Dalzell*,

Alt. *Blair*.

Home, Clerk.

C.

N° LVI.

January 27. 1789.

HUGH GORDON,

AGAINST

ALEXANDER CLERK.

PASSIVE TITLE.—*Gestio pro hærede. An heir at law, who, as such, had concurred with a gratuitous disponent in heritage, in granting a discharge of an heritable debt falling to the heir, but from enjoying which he was precluded, by the disponent's claims of relief from the ancestor's debts,—found not thereby to incur the passive title of gestio pro hærede.*

JOHN CLERK executed several special deeds of settlement, by which he conveyed to James, one of his younger sons, all his moveables, and also his whole heritage, but an heritable bond for L. 60, that being omitted in the enumeration contained in the different dispositions.

On the death of John Clerk his debts far exceeded his executry-funds. Afterwards, when the heritable bond came to be paid, Alexander, the eldest son, joined with James in granting the discharge; the former denominating himself “the heir at law,” and the latter “the disponent and executor” of John Clerk.

James having become insolvent, Gordon, a creditor of John Clerk's, sued Alexander for payment of the debt, as having in that manner incurred the passive title of *gestio pro hærede*.

The defence stated was, That the debt had been conveyed in a general disposition to James, so that the discharging of it by Alexander was an inept and insignificant proceeding. It turned out, however, that no such general disposition had been made; and the Court finally “repelled the defence.”

The defender having appealed to the House of Peers, “the cause was thence remitted to the Court of Session, *without prejudice*, with liberty to the defender to produce such proofs as he could, that James Clerk, at the date of the discharge, was intitled to the debt of L. 60.”

When the cause thus came again into Court,

The defender *pleaded*: James Clerk, who was his father's executor, was also his disponent in heritage; while the defender, as heir-at-law, had right to the undisposed of security for L. 60. Now, as the executry-funds fell far short of the personal debts, James was intitled to attach the subject falling to the heir-at-law, in order to extinguish those debts, that

that the right might be preserved to him, which, as a singular successor, he had obtained by his father's settlements. In the subject of the discharge, therefore, the defender had no real or substantial interest; and it would be hard to construe an act which could not reasonably be done with any view to his own profit, into the passive title of *gestio pro hærede*. "Passive titles are not now so strictly attended to as they were formerly." Ersk. b. 3. tit. 8. § 83. Even at a more early period relief was given in a case not dissimilar to the present. Harcarfe, 16th December 1682, Thomson *contra* Anderson.

Answered: No act of behaviour as heir can be conceived more complete than that in question, done not only in the character but under the appellation of heir-at-law; l. 20. ff. *de acquirend. vel amittend. hæred.* Stair, p. 505.; Bankt. vol. 2. p. 366.; Ersk. p. 586. Nor is there any room for the defender's plea of favour, in opposition to a passive title so salutary in guarding against the fraud of heirs. The law should act with a constant and regular operation, giving in all cases a settled effect to settled principles, however individuals may happen to be affected; nor, in truth, is any thing more *favourable* than a due and steady application of the same law to all cases falling under it. If this be departed from, a *jus vagum et incertum* will be introduced, under which no man can know to what he should trust; and it is better that one man should suffer by his own inattention or fault, than that the law, and through it the security of the whole subjects, should be injured. Accordingly heirs are held to be liable, even where there is not the least suspicion of intromission; Stair, July 1672, Foulis *contra* Forbes; July 2. 1743, Hutchison *contra* Menzies; Dict. of Dec. vol. 3. p. 268.; Ersk. p. 587. § 84.; Bankt. vol. 2. p. 354. § 102. Nor is the case quoted from Harcarfe different; for the defence there was, that the debt had not been discharged. At the same time it is to be observed, that James could have no occasion for a claim of relief against the L. 60 security, because it was only *quoad* the excess of the debts beyond that part of the disponer's estate, that the disposition to James was reducible at the suit of creditors.

The Lord Ordinary again repelled the defence; and the defender reclaimed to the Court, when it was

Observed on the Bench: As the Court, in the case of Maitland of Pitrichie*, in that of the creditors of Ayton†, and in other instances, have given relief against an actual service, when there was no intention to represent; so, *a fortiori*, is that indulgence due here, where the claim is laid on the mere appearance of *gestio pro hærede*.

The Court altered the Lord Ordinary's interlocutor, and "sustained the defence against the passive title of *gestio pro hærede*."

Lord Ordinary, Alva.

Adv. M. Refs.

Alt. Lord Advocate.

Clerk, Gordon.

S.

* 1st December 1757.

† 7th July 1784.

N^o LVII.

January 29. 1789.

TRUSTEES of ALEXANDER WEDDERBURN,

A G A I N S T

Mrs MARGARET COLVILLE.

PERSONAL and TRANSMISSIBLE.—*It is optional to a substitute heir of entail, to avail himself of an irritancy incurred by the heir in possession, so that it is not an adjudgeable faculty, or such as devolves any right to the husband of a female substitute, under the jus mariti.*

MRS COLVILLE, a married woman, prevailed in a declarator of irritancy of the right of an heir of entail in possession. During the dependence of that process, which, under her mandate, was carried on by certain creditors of her father's, they entered into an agreement with herself and her husband, by which she engaged to pay to those creditors two-thirds of the rents of the estate, during her incumbency; she, on the other hand, being to enjoy the remaining third, and her husband's *jus mariti* being excluded.

The creditors of the husband having arrested these rents as falling under the *jus mariti*, and raised a process of forthcoming, they

Pleaded: By means of the right arising to Mrs Colville, through the irritancy of the entail being incurred, an estate, the rents of which were to belong to her husband during their joint lives, devolved on her. Of this life-rent-right it was not in her power to disappoint him; for he alone, even without her consent, would have been intitled to institute the declarator. This power or faculty then was a competent subject for his creditors to adjudge: Stair, b. 3. tit. 2. § 16.; Ersk. b. 2. tit. 12. § 6.; Bankton, b. 3. tit. 1. § 35, 38.; Steuart's Anf. to Dirleton, *voce* Adjudication; and of that *jus quæsitum*, the agreement in question cannot deprive them. Nor is it of any importance that the irritancy was not then actually declared; for the same *jus quæsitum* arises in a contingent right of property as in one already vested.

Answered: Irritancies, such as this, are of a highly penal nature; and there is no authority for asserting that an heir is in any respect bound, contrary to his will, to avail himself of the right which thence results to him. The defender then could not have been compelled, either by her husband or by creditors, to institute the declaratory action.

Feb. 1789.

COURT OF SESSION.

101

tion. It was entirely in her option, whether to exercise her right, or in what manner; and consequently in this matter she is not to be controuled, although the effect of the present demand were not, as it is, to deprive her of bread.—Besides it may be said, that the creditors, by bearing the expence of the process, have purchased the right which they acquired.

The Lord Ordinary reported the cause, when the Court seemed to be moved by the first part of the above argument for the defender, and

“ Found the arrestments used by Lord Loughborough, and the
“ other trustees of Mr Wedderburn of St Germain's, ineffectual for
“ attaching the rents *in medio*; and preferred the factor for behoof of
“ Mrs Margaret Colville, her husband, and creditors thereupon.”

Lord Reporter, Stonefield.
Clerk, Gordon.

Ast. Wight, G. Fergusson.

Alt. Maconochie.

S.

Nº LVII.

February 3. 1789.

WILLIAM RIDLEY,

AGAINST

The CREDITORS of JAMES HAIG.

PRIVILEGED DEBT.—*Wages, or a yearly salary to the overseer of an extensive distillery, not such.*

WILLIAM RIDLEY was employed, with a salary of L. 300 *per annum*, as overseer in an extensive distillery carried on by James Haig.

After Haig's bankruptcy, the trustee on his sequestrated estate having, in consequence of particular instructions from the creditors, made payment of a term's wages to the farm-servants, and also to those who had been employed for domestic purposes, Mr Ridley claimed a preference, in the same manner, for a year's salary. He

C c

Pleaded:

Pleaded: No reason surely can be given, why an ingenious artisan or mechanic should not have the same indulgence which has been given to those employed in the meaner and less profitable business of cultivating land, and even to such as have been retained perhaps for the purposes of domestic luxury and extravagance. If, in general, the privilege be an incroachment on the just rights of other creditors, it ought to be done away: But if, on the other hand, it is founded on the wisest and most equitable grounds, by securing to those who commonly have no other support, that livelihood which their industry has earned, while it tends to prevent those illegal combinations that would otherwise take place on a bankruptcy, between masters and servants, to the great prejudice of the creditors at large, the law ought to be the same, where-ever the same inducements occur.

Answered: Those privileges which stand in the way of a rateable distribution of the effects belonging to a bankrupt, being a deviation from the common rules of law, and, in general, taking their origin from limited and imperfect notions of commercial utility, have of late been justly restrained within the narrowest bounds. Unless authorised by such a train of decisions as cannot be departed from without shaking the public security, the tendency of our Courts, of late years, has uniformly been to discourage all claims of this sort.

The preference here demanded, so far from deriving any support from former precedents, is quite inconsistent with the daily practice. Although servants employed in husbandry have been, by inveterate custom, allowed to receive their wages before all the other creditors, the same privilege was lately, by a solemn decision, refused to mechanics and artisans. And in England, where every requisite encouragement is held out to industry and manufactures, it has never been thought expedient to break through the rule of law in favour of servants of any description; 23d January 1779, *Melville contra Barclay*; 31st January 1781, *Whyte contra Chrystie*.

It was urged as a circumstance favourable to Mr Ridley's claim, that the proceeds of the spirits falling under his superintendence were much more than sufficient for his payment.

The interlocutor of the Court was as follows:

"The Lords, on the report of Lord Monboddo, and having advised the informations for the parties in this cause, they sustain the defence, and assilzie; reserving to the pursuer to rank on the bankrupt-estate, in the same manner as the ordinary creditors."

A reclaiming petition was afterwards offered for Mr Ridley, in which, without endeavouring to obtain an alteration of the judgment on the point of law formerly argued, he maintained, that in consequence of certain proceedings between him and the trustee, he was intitled to recover his salary, without any deduction.

This

Feb. 1789.

COURT OF SESSION.

103

This petition, with the answers, was remitted to the Lord Ordinary.

Lord Reporter, *Monboddo.*

Ast. *Hope.*

Alt. *Maconochie.*

Clerk, *Orme.*

C.

N^o LVIII.

February 6. 1789.

EARL of WEMYSS, and others, Inhabitants of Canongate,

A G A I N S T

The MAGISTRATES of CANONGATE.

PUBLIC BURDENS.—*Burgeses or Traders, and not private inhabitants of towns, liable to the burden of the local quartering of soldiers.*

THE Magistrates of Canongate, in 1786, passed a sentence, “finding, “That the inhabitants of that borough were all indiscriminately “liable to the charge of the local quartering of soldiers; and ordering “accordingly that they should be quartered on the whole inhabitants “without distinction:” Whereas formerly the burgeses and traders only had been subjected to that burden. For about two years the imposition was so far submitted to, that the other inhabitants paid a tax by way of commutation for it. At length a suspension of the Magistrates order was obtained by them, and an action of declarator of exemption instituted, in which evidence was produced, that the usage of every considerable town in Scotland, where soldiers were *locally* quartered, had always been to billet them on burgeses exclusively of the rest of the inhabitants. The pursuers

Pleaded: Those only are liable to the *charge* of thus quartering soldiers, who are bound to perform the service of watching and warding within borough. This description applies to burgeses alone; who, when they submit to the former inconvenience in favour of those who relieve them from the latter, should not repine at paying so small a price for so great a benefit.

The common law protects every man in the sacred retirement of his own house, which is never to be violated by the intrusion of any class of people. Nor is the imposition in question warranted by the statute-law. The quartering of soldiers is for the first time mentioned in the

the act of convention of 1667. In order to guard against the abuses which might thence arise, several posterior acts of Parliament were framed, viz. 1681, c. 3.; 1690, c. 6.; 1693, c. 4.; 1695, c. 33.; 1696, c. 23.: And, in particular, by the statute of 1698, c. 9. it was enacted, "That in time of peace within the kingdom, soldiers, in their local quarters, should only be quartered by those to whom the direction thereof appertains, in boroughs royal or of regality, or the most capable market towns within the shires where their quartering should be ordered, and that they should not be quartered upon tenants in dispersed onsteads in the country, upon pretence either of stubble-quarters, or of any other cause whatsoever." But as in none of these acts of Parliament is the burden laid on the occasional or unconnected inhabitants of towns, so by the universal usage of Scotland, it is confined to the constituent members or burghesses; and by that usage the meaning of those enactments, so far as indefinite, is to be determined. Nay, by such immemorial custom, even contrary enactments would have been repealed or abrogated; Erskine, b. 1. tit. 1. § 45. The last-mentioned statute of 1698, corrected an abuse committed in the country, under the pretence no doubt of the necessity of resorting thither for provender to the army; but it surely indicates no extension of the burden beyond its proper limits in towns.

Answered: If a public burden is to be imposed, it were hard that those only who are most able to bear it should be exempted, to increase the load of such as are least able. The words of the statute of 1698 are general, admitting no exception, but that singly in behalf of tenants in dispersed onsteads "in the country." Nor could any posterior practice abrogate the law. For the annual mutiny-act declares that the quartering of soldiers shall be regulated "by the laws of Scotland which were in force at the time of the Union."

The Lord Ordinary reported the cause, when

The Court considered the plea of the pursuers as strongly founded in the usage; and it was observed, that prior to the act 1698, there must have been the same usage as afterwards, seeing there was nothing in that statute to introduce a change.

The Lords decerned in the declaratory action, "finding the pursuers exempted from the charge in question."

Reporter, Lord Alva.
Clerk, Home.

A&C. Rolland.

Alt. Lord Advocate, A. Fergusson, Hope.

S.

N^o LIX.

February 9. 1789.

Dame ELISABETH BRUNSDONE.

A G A I N S T

Sir THOMAS WALLACE, Baronet.

FORUM COMPETENS. — Ratione originis. *A marriage celebrated in England between two natives of Scotland, how far dissoluble in the Scotch Courts.*

SIR Thomas Wallace, a native of Scotland, left this country when thirty years old, without any intention of returning.

Having gone to England, he made his addressee to Mrs Elisabeth Brunsdone. She also was a native of Scotland, but had for many years resided in England.

They were married in London according to the rites of the English church. Soon after, they went to France, from whence the Lady returned to England, and then commenced, in the Commissary-Court of Edinburgh, a process of divorce on the head of adultery. The criminal acts were said to have been committed in France.

Sir Thomas Wallace, as being out of Scotland, having been cited at the market-cross of Edinburgh, and at the pier and shore of Leith, the Commissaries proceeded in the usual way to allow a proof. But a bill of advocacy to the Court of Session was preferred, in which it was

Pleaded: Jurisdiction and the power of putting the sentence of the judge in execution, are counterparts of each other: without the latter, the former would be nugatory and absurd. In order to constitute a *forum*, therefore, either the party called as defender, or, where the question is purely of a pecuniary nature, some part of his effects, must be subject to the orders of the Court. Thus the Judges in Scotland cannot regularly exercise any judicial authority with regard to a Scotman who has left this country, and who has no effects remaining in it.

The *forum originis*, which might be necessary while mankind continued in a migratory state, is now only regarded in questions concerning allegiance, which, according to the maxims of political law prevailing in modern Europe, is due to the governing power of that state where a person happens to be born; or if it is to be of any effect at all in questions of private right, it can only be sustained in ordinary actions of debt, where, from a recognition of its authority,

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little injustice can arise. But in that most important part of civil jurisdiction which respects a man's state and condition in society, it ought never to be resorted to. In questions of this sort, no proper example will be given of any judicial proceedings having been held against a native of this country, who had no effects here, and who, long before the commencement of any suit, had abandoned Scotland for ever.

Although, however, the Scottish Judges could in general take cognisance of every question in which a native of Scotland was interested, the present action must be altogether inadmissible. In all agreements which are entered into in a foreign country, the *lex loci contractus* has been held to be the governing rule; and it is agreeable to the probable intention of the parties, that this should be the case. And in England, where the marriage between the pursuer and defender was solemnized, an action of divorce, as a consequence of conjugal infidelity is unknown. The dissolution of a marriage on this ground can only be obtained by the interposition of the legislature, of which there is no instance where the woman is the injured party. In France too, it may be farther noticed, where the criminal acts are said to have been committed, and where the defender still resides, as well as in all other countries in which the authority of the Roman Pontiff is acknowledged, a marriage can be dissolved by no other.

Thus, with regard to persons married in England, although they are immediately subject to the Scottish Courts, no action of this nature ought to be admitted; unless perhaps, where the parties, by continuing for a considerable time in Scotland, have become liable to its peculiar laws. But in the case of those who, in consequence of their birth alone, are in any degree connected with this country, this must be peculiarly expedient and just. If, in circumstances such as these, the determination of the Scottish Judges were to be attended to in foreign countries, an effect would be given to an agreement quite opposite to the intention of the parties. If otherwise, the greatest embarrassment would ensue; a man thus being unmarried in one country, and married in another, while all the consequential rights would be placed on the same uncertain footing. Historical Law Tracts, *voce* Courts; Kilkerran, January 1747, Hodgeson *contra* Anderson; Voet. lib. 2. tit. 1. § 46.; lib. 5. tit. 1. § 96. *in fine*; Inst. Jur. Canon. lib. 2. tit. 16.; Blackstone's Commentaries, book 1. c. 15. § 7.

Answered: A native of Scotland, from the moment of his birth, is intitled to the protection of its laws. He, in the same manner, becomes amenable to those laws, and to the courts of justice which have been established for enforcing them.

If a Scotsman enters into the service of a foreign state at enmity with this country, even although he may have lived in it for many years, he will be subject to the punishment of high treason. If he has committed a crime in Scotland, sentence of outlawry will, in his absence, be issued against him. So that in those instances in which the presence of the defender would seem to be most requisite, this circumstance

stance is, with respect to a native of Scotland, held to be of no importance.

With regard to actions of debt too, of the greatest extent, it is admitted, that the Scotch Courts are vested with sufficient authority to pronounce a decret against a Scotsman, although he has left Scotland for ever. Where then is the line to be drawn? Indeed so much is the jurisdiction *ratione originis* acknowledged in Scotland, that a form of citation at the market-crofs of Edinburgh, and pier and shore of Leith, has been introduced for summoning those who cannot be found personally, and who have no known place of residence in this country.

A jurisdiction so constituted, it might be farther observed, seems to be absolutely necessary for the purposes of justice. As the *forum domicilii* almost entirely depends on the will of the party himself; as those arising from the *locus contractus*, and the *locus delicti*, can only be resorted to, if the defender can be personally apprehended where the agreement was made, or where the crime was committed; while, in that of the *rei sitæ*, the proceedings are necessarily confined to particular subjects; it is evident, that some other tribunal ought to be established, which shall be unlimited both in its duration and in its effects.

It does not therefore seem to admit of dispute, that the defender may, notwithstanding his absence, be sued in the Scottish Courts. And the other argument, arising from the celebration of marriage in England, is equally erroneous. It is true, that in order to maintain a regular intercourse with foreign countries, as in matters of private right England is with respect to us, it has been settled, that those agreements which are entered into abroad, shall, if solemnized according to the law of the place, be effectual in Scotland, although the formalities here required have not been observed. Still, however, no agreement entered into in a foreign country, can be more obligatory in Scotland than it would have been, if it had been celebrated in Scotland with all the forms which are requisite here. This seems to be quite decisive. An agreement between two natives of Scotland, that their marriage should not be dissoluble for adultery, would be illegal and void. And every marriage celebrated in Scotland may be dissolved on this ground.

Were a different rule to be adopted, the utmost confusion and injustice would follow. The Judges in Scotland, in all questions arising from contracts executed abroad, would be obliged either to forego the law of Scotland, which they know, in order to adopt the law of a foreign country, of which they are ignorant; or they must abstain from judging altogether. Thus, instead of pronouncing a sentence of divorce in consequence of adultery, where the marriage had been celebrated in England, they would be under a necessity of awarding, as is done in Doctors Commons, a separation *a mensa et toro*, or of leaving the injured party without any redress whatever. All the other subordinate rights too, those of alimony, of terce, and courtesy, the legitimacy of the children, &c. would be judged of in the same manner. Compared with these, the inconveniences suggested on the other
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side are of no weight. While the laws of different countries are different, some embarrassment will unavoidably arise; as in the case of a person born out of wedlock in England, who, notwithstanding the subsequent marriage of his parents, will be reputed a bastard in England, though capable, in this country, of succeeding as a lawful child to the most important rights. But where a marriage has been dissolved in a competent Court, there is no reason to suppose, that the parties will not be considered as disengaged from each other in every country where they may chuse to reside. Dict. *voce* Forum competens; Erskine, book 1. tit. 2. § 16. 17. 19.; Id. lib. 1. tit. 4. § 34.; 15th November 1626, Galbreath; 8th December 1626, Blantyre; 27th June 1760, Hog *contra* Tenant.

In support of the foregoing general argument, the pursuer also contended, that the defender, as inheriting a Scotch title of honour, and as the substitute in the entail of a considerable landed estate in Scotland, was amenable to the Scotch Courts. But the question was decided on general principles. The majority of the Court seemed to be of opinion, that there was a *forum ratione originis*, so as to found a jurisdiction in the Commissaries; but that it was not competent for them, in the circumstances of the case, to pronounce a judgement of divorce between the parties.

One of the Judges expressed an opinion, that marriage, as regulated by the laws of Christianity, was to be considered as in some degree *juris gentium*, and that where the municipal constitutions of different countries in which the Christian religion was acknowledged were at variance, recourse might be had to the rules laid down in holy writ, by which adultery was declared to be a sufficient cause of divorce.

The Lord Ordinary refused the bill of advocacy; and a petition reclaiming against this judgement being followed with answers, was also refused.

But after advising a second reclaiming petition with answers, the Lords "remitted the cause to the Commissaries, with instructions to "dismiss the action."

And a reclaiming petition having been preferred, and answers being given in, the Lords adhered to this judgement.

Lord Ordinary, *Monboddo*.
Alt. Blair, *Craig*.

Ast. Dean of Faculty, *Wight*.
Home, Clerk.

C.

N^o LX.

February 9. 1789.

BARBERIE DE DA MOTTE,

A G A I N S T

ALEXANDER JARDINE.

HUSBAND and WIFE.—*Aliment found due to a wife after a decret of divorce had been extracted.*

ALEXANDER JARDINE brought a process of divorce in the Commissary Court, against Barberie de la Motte, his wife, on the head of adultery, and obtained a decret, which he immediately extracted.

After this, an action was brought by Mrs de la Motte in the Court of Session, for setting aside this decret, as obtained upon false evidence. The Lord Ordinary dismissed this action; but a reclaiming petition was preferred, and along with it a separate petition, praying for an *interim* aliment, and for a certain sum in order to defray the expence of the action. In bar of this demand, it was

Pleaded: While a woman is *vestita viro*, her husband, as possessed of the whole funds belonging to both, is obliged, besides giving her a suitable aliment, to advance such sums as may be necessary for maintaining any litigation in which she may be interested. But the reason of this obligation ceases after the marriage has been dissolved by the judgement of a competent court, which, after it is final, must be held *pro re judicata*, not only until it is brought under challenge, but until it has been set aside as erroneous and unjust. Otherwise, indeed, it would be in the power of every woman, after she had been divorced for conjugal infidelity, not only to insure to herself a maintenance suitable to her husband's rank and fortune, as long as she was able to protract the litigation, first in this Court, and afterwards in the House of Lords, but also to throw upon him the whole expence attending those proceedings.

Answered: Until it has been determined, whether a marriage is dissolved or not, it cannot be said that such a separation has taken place as should deprive either of the parties of their legal rights. It surely

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cannot

cannot make any difference, whether the question is still depending in the Commissary Court, or in the Court of Session, or whether the judgement of the inferior Court has been brought under review by a bill of advocation, or afterwards in the shape of a process of reduction. It would be singular, if, in reviewing a sentence of the Commissaries, the Judges in the Court of Session should find themselves precluded from doing what the Commissaries themselves, on reviewing their own judgements, always do: And it would be no less unjust; a wife having occasion to complain of proceedings held against her, being almost equally injured, when the means of maintaining a litigation are withheld; as when an unjust judgement is pronounced. Act 1609, c. 6.; Balfour's Practics, p. 95.

After affirming the judgement of the Lord Ordinary, dismissing the action brought by Mrs de la Motte,

The Lords found, " that the pursuer was not intitled to any aliment, or to the expences incurred in the action at her instance."

But a second reclaiming petition being preferred, which was followed with answers, the Lords found, " that the pursuer was intitled " to an aliment, and to the expence of the process of reduction, till " the date of the final interlocutor, repelling the reasons of reduction."

Mr Jardine reclaimed; but his petition, after being advised with answers, was refused.

Lord Ordinary, *Haile*.
Menzies, Clerk.

A&A. *Wight*, *Steuart*.

Alt. Lord Advocate, *Blair*.

C.

N° LXI.

N^o LXI.

February 13. 1789.

GEORGE WADDELL,

AGAINST

ROBERT COLT.

GENERAL ASSIGNATION.—CLAUSE—*disponing all sums of money due by bond, does not comprehend those due by heritable bonds.*

THE proprietor of the estate of Garturk executed a settlement in favour of Mr Colt, by which he conveyed to him that estate, and assigned to him “the haill sums of money he should have be-
“longing or addebted resting and owing to him *by bonds*, &c. with
“the said bonds themselves,” &c.

Mr Waddell, the heir-at-law, raised an action declaratory of his having, in that character, right to certain heritable bonds that belonged to the deceased, and to all other debts heritably secured, which were due to him at the time of his death; and,

Pleaded: When any debt is heritably secured, it is understood to have become secondary to the real or heritable right of lands thereby acquired, which last is therefore the immediate and proper object of the law. Hence it no longer comes under a description belonging to moveable subjects. Thus an assignation, *mortis causa*, to “all debts
“and sums of money,” was found not to comprehend an heritable bond; 6th January 1736, *Mochrie contra Lin*, Dict. vol. 1. p. 340. And in the case of David Ross *contra* Elisabeth Ross, decided in March 1770, the Court, by a judgement affirmed on appeal, determined, that a disposition “of all debts and sums of money” was not effectual to convey heritable debts.

Answered: As no argument can be safely drawn from one *questio voluntatis* to another, unless when the respective circumstances accurately correspond, it seems improper to consider the cases that have been quoted, as precedents with respect to the present. Independently of precedent, the express conveyance in question, “of the whole sums of
“money due by bonds,” would seem inconsistent with the supposed exception “of sums of money due by heritable bonds.”

The Lord Ordinary, “in respect of the practice of the Court, and
“particularly in the case of David Ross, repelled the defences.”

On

On advising a reclaiming petition and answers, the Court considering, as the Lord Ordinary had done, the decision in the case of Ross to have established a rule,

Adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Swinton*.

A&S. *M. Ross*.

Adv. *Blair*.

Clerk, *Sir J. Colquhoun*.

S.

N^o LXII.

February 20. 1789.

MARY FORREST,

A G A I N S T

CHRISTOPHER FUNSTONE.

FORUM COMPETENS—*ratione domicilii*. *Holding a military office without actual residence, does not create a domicile.*

CHRISTOPHER FUNSTONE, a native of Ireland, enjoyed for some years the office of master-gunner in the castle of Blackness in Scotland.

In 1779, when Mr Funstone first came to this country, he had provided himself with a bed, a chest of drawers, and some other articles, which he kept in the room appropriated for him at Blackness; but his office being almost a sinecure, even in the time of war, he had never resided there for more than three or four days.

In 1783, Mr Funstone appears to have left Scotland without any fixed intention of coming back. And in the returns made by the Commander in Chief for Scotland in 1784, he had been mentioned as absent without leave.

In the month of April 1784, Mary Forrest, likewise a native of Ireland, instituted, in the Commissary-Court of Edinburgh, an action for declaring a marriage between her and Mr Funstone. It was said to have taken place in Ireland. The citation in this action was performed by leaving a copy of the summons at Blackness-castle.

An objection having been stated to the competency of the action, the Commissaries found, That "the defender having, at the time of
" the

“ the citation, been possessed of a furnished apartment in Blacknefs-
 “ castle, was amenable to the Scotch Courts.” In support of which
 judgement, a bill of advocation having been offered, the pursuer

Pleaded : To the effect of founding a jurisdiction, a domicile may be established, not only by actual and permanent residence, but also by holding an office or dignity, which renders such residence the duty of the party. Hence, in the Roman law, from which our ideas on this subject are chiefly borrowed, a senator was understood to be subject to the jurisdiction of the courts in Rome, although he might reside elsewhere; and a soldier was understood to have a residence *ubi merebat*. In the present case, these considerations are strengthened by the circumstance of the defender's having a furnished apartment in the place where the summons was executed; and where, as it appears from the official returns, his attendance was expected.—It might be noticed too, that in such actions as the present, brought for ascertaining the *status* of the pursuer, our Courts have proceeded on grounds much more slender than those which here occur; by sustaining action against an Englishman who had enjoyed a civil office in Scotland, but who, before the process was instituted, had renounced it and gone to England with an intention never to return; l. 8. *D. de incolis*; l. 23. *D. ad municipal.*; 29th December 1724, Haldane *contra* The York-buildings Company; 11th June 1745, Dodds *contra* Westcombe.

Answered : A domicile in our law, is where a man has fixed his abode for more than forty days preceding the execution of the summons. It is true, that an action may be brought in the Courts of Scotland, against one neither residing nor personally apprehended in this country, if the subject claimed by the pursuer is situated here, or if the only purpose of the action is to attach a land-estate; and what is perhaps peculiar to Scotland, by arresting moveable effects belonging to a man not residing in it, a jurisdiction may in certain cases be created.—But to suppose, as the Commissaries have done, that having a few trifling articles of furniture was to establish a jurisdiction without any previous arrestment, especially where the ground of action is not said to have arisen in Scotland, is incompatible with the principles of our law. In a late case it was determined, in opposition to the judgement in that of Dodds *contra* Westcombe, which has never been received as a precedent, That in actions merely declaratory, respecting personal rights, an arrestment of moveable effects situated in Scotland, will not justify the interposition of our Courts, even where the contract sued on was said to have been executed here: *Voet*. lib. 1. tit. 2. § 16.; *Erskine*, b. 1. tit. 2. § 16.; 1st December 1772, *Scruton contra* Gray.

The question having been reported to the Court on memorials, the Lords were unanimous in altering the judgement of the Commissaries. The defender's having been absent from his duty, it was observed, might subject him to some military censure, but a domicile could

not be created without residence ; and the circumstance of his having a few articles of furniture in Scotland, at the date of the citation, without any arrestment of them, was equally ineffectual.

“ The Lords remitted to the Lord Ordinary, to remit the cause to the Commissaries, with this instruction, that they dismiss the action.”

Lord Reporter, *Dreghorn.*

Adv. *Dickson.*

Adv. *Maccormick.*

C.

N° LXIII.

February 20. 1789.

BALFOUR FOWLER,

AGAINST

JOHN GILLESPIE.

BATTERY—PENDENTE LITE.—Act. 1594, cap. 219. *This statute not in desuetude.*

DURING the dependence of a process of declarator of property at the instance of Fowler against Gillespie, the latter, in an accidental rencounter with the former, gave him a stroke with a potatoe-hoe, by which he was slightly hurt.

On this circumstance Gillespie instituted an action for having it found, in terms of the statute of 1594, cap. 219. “ that without farther probation, decree in his favour should be pronounced in the depending process of declarator.” It was

Pleaded for the defender : At the æra of the enactment in question, the state of this country was extremely different from what it is at present ; inasmuch that the legislature, from necessity, appears to have had recourse to so extraordinary a remedy. The violence of it was thought to be justified by the magnitude of the evil ; for “ the manifold oppression done within the realm between parties contending

“ tending in justice, by proud and undaunted oppressors,” as the preamble of the act bears, forced the legislature to adopt a method of cure, that, without any exertion of the executive power, which was weak, might operate forcibly, though not very equitably or justly. But, in modern times, when the evil has ceased, and manners are totally altered, to preserve in force such an undistinguishing penal law, would be much the same as to continue the severe regulations, made in the time of a plague, after the distemper had subsided, and the country was restored to its usual health.

Accordingly this penal statute has been so little heard of in later times, that it is not without reason it has been made a question, whether it had not entirely gone into desuetude. The occasions have been few where it could have been insisted on in the present mild state of manners; and, if any did occur, men of spirit would despise, and men of integrity would scruple, to take such an advantage of their neighbour.

The statute is exceptionable in another view; since, comprehensive and unlimited as its terms are, it cannot, without absurdity, be extended indiscriminately to causes of every kind. For example; in the case of a declarator of marriage, it is impossible that a battery, committed by the defender on the pursuer, should at once make them married persons, however clear it might be that no marriage had existed.

Answered: Of the import of the statute of 1594, or of those preceding similar enactments which it ratified, there can be no doubt. Nor is it less certain that those laws are still in observance, as was determined in the case of Gordon *contra* Gordon, Fac. Coll. 27th February 1781, and in some other late instances; so that all inquiry with respect to the original causes of their institution is precluded.

The Lord Ordinary reported the cause, and

“ The Lords found the battery *pendente lite* by the defender John Gillepie sufficiently instructed; and therefore, agreeably to the declarator at the instance of the pursuer Balfour Fowler, found he had good and undoubted right to the property of seven eleventh-parts of the lands of Todsgreen,” &c.

A reclaiming petition against this judgement, though appointed to be answered, was afterwards refused.

Reporter, Lord Eskgrove.
Clerk, Home.

A.G. G. Fergusson.

Alt. M. Ross, McCormick.

S.

N^o LXIV.

February 24. 1789.

GIDEON GRAY,

AGAINST

ARCHIBALD SETON.

LIFERENT.—*Right of a liferenter, as to the woods growing on the life-rented lands.*

THE late Mrs Seton being heiress of the estate of Touch, disposed in her marriage-articles these lands, with the woods, fishings, &c. “to herself and to her husband in conjunct fee and liferent, for “her husband’s liferent-use allenary,” &c.

After Mrs Seton’s death, her husband became insolvent. His estate, including his liferent-right in the lands of Touch, was brought to sale; and among other things, the Court authorised a sale of some coppice-wood on this estate, none of which had been cut for thirty years. Afterwards, Gideon Gray, factor on the estate then sequestrated, applied to the Court of Session, for authority to expose to sale certain other woods on the lands of Touch, which he divided into three different classes; *first*, what was formerly coppice-wood, but had been allowed by the liferenter to grow up into large trees; *2dly*, old planting which was on the estate before the liferenter’s right commenced, and was already fit for cutting; and *3dly*, the trees planted by the liferenter himself, so far as they were fit for immediate use.

Archibald Seton, the only surviving son of the marriage, and after his mother’s death, the *fiar* of the lands of Touch, opposed this measure; and

Pleaded: Our law has established a clear and distinct boundary between the rights of *fiar* and of liferenter; the former, if not restrained by

by special agreement, enjoying the uncontrouled privilege of using his property in any manner he pleases; while the latter is only intitled to reap the annual produce of the lands, without performing any act which may render them of less value in any one year than they were before. Particularly, with regard to growing timber, great care has been taken to restrain liferenters from doing any thing which may deprive the lands of that shelter, which, in this country, is so essential to them. Unless in the case of a coppice-wood, which has formerly been in use to be cut annually in different *bags*, so as to yield a constant yearly rent, a liferenter is not at liberty to cut, for sale, woods of any description whatever. And this, whether the trees have been planted by himself or by others. Erskine, book 2. tit. 9. § 56. 57. 58. 13th July 1677, Lady Preston; June 1727, Heirs of Roseburn.

Answered: The authorities above referred to, should seem to be applicable only to the case of widows having their jointures secured on their husbands lands, and cannot be extended to the present one. As during the marriage, the husband here might have cut down the whole trees on the estate; no good reason can be assigned, why, after its dissolution, and while his right seems to be equally broad as formerly, he, and *a fortiori* his creditors, should not be allowed at least to proceed in the same way as a proprietor of the estate acting *tanquam bonus paterfamilias*, might have done. There seems to be a considerable degree of expediency in such a construction of the liferenter's right. Without it, persons so situated would be apt, while the marriage subsisted, to exercise their powers in a manner very prejudicial to the estate. And, with regard to that part of the woods which has been planted by the liferenter himself, it would be manifestly unjust, if he were not thus allowed, without any injury to the lands themselves, to avail himself of the fruits of his own industry. So far from being conducive to the advantage of the proprietor, this would, in general, prove a real loss to him, while the improvement of the country at large would be greatly hindered by it: Bank. b. 2. tit. 6. § 16.

After advising the petition for Gideon Gray, with answers for Mr Seton, which were followed with replies, the Court were of opinion, that a liferenter had no right to sell any part of the woods growing on the liferented lands, unless in the particular case of a coppice, which had been in use to be cut in a certain yearly progression, so as to yield a constant annual income to the possessors; and that the warrant of sale, so far as it allowed this, ought to be recalled. Mr Gray therefore having agreed to pass from any objection in point of form, the following interlocutor was pronounced:

“ The Lords find, That none of the woods or plantations condemned on, fall under the liferent of Mr Hugh Seton; and there-
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"fore appoint such of the said woods or plantations as are contained
"in the act of roup, to be struck out of the sale; and refuse the de-
"fire of the petition."

Adv. Abercromby.

Adv. Dean of Faculty.

Hume, Clerk.

G.

N^o LXV.

February 25. 1789.

TRUSTEES of JANET DOUGALL,

AGAINST

JOHN DOUGALL.

TESTAMENT.—*A deed settling on the grantee the granter's whole effects and funds, and, in the event of non-acceptance, discharging the grantee of a debt due to the granter by him, found to be in both parts testamentary and revocable.*

JANET DOUGALL executed, in favour of John Dougall her grand-nephew, a deed, consisting, *first*, of a general disposition of her whole effects and of the debts due to her, under the reservation of her liferent; and, *2dly*, in the event of the disponee's refusing to accept this conveyance, of a discharge to him of a bill granted to her by his father for L. 150; the interest of this sum during her life being likewise reserved.

For payment however of this bill, the discharge of which she had revoked by a formal writing, an action was brought against John Dougall, by certain trustees, in her name.

Pleaded for the defender: The first part of Janet Dougall's deed is revocable, that being of a testamentary nature; but the second is a *pactum inter vivos et de presenti*, the irrevocable nature of which is not altered by its being subjoined to the *mortis causa* settlement. It is moreover strengthened by a clause of warrandice, implying the most absolute renunciation of any power to revoke.

Answered: Any renunciation of a power to revoke in such a case is of no avail, because it necessarily partakes of the nature of the deed itself,

March 1789.

COURT OF SESSION.

119

itself, in the same manner as if it had occurred in a donation *inter virum et uxorem*. The two parts of the deed therefore are not to be contradistinguished, both being of the same testamentary nature.

The Lord Ordinary having reported the cause,

The Lords found, that the discharge was revoked.

Reporter, Lord Dreghorn.
Clerk, Sinclair.

A&C. Arch. Campbell.

Alt. Macleod-Bannatyne.

S.

Nº LXVI.

March 6. 1789.

Sir WILLIAM FORBES, Baronet, and others,

AGAINST

WILLIAM BLAIR.

MEMBER OF PARLIAMENT.—*The wadset of a fee of superiority, burdened with a right of liferent in favour of another person, found insufficient to confer the privileges of a freeholder.*

PRIOR to 1787, the Duke of Gordon had granted to Æneas Macintosh the liferent of the superiority of certain lands.

In 1787, the Duke conveyed to William Blair the fee of the superiority of the same lands, redeemable on payment of L. 50 Sterling “at the first term of Whitsunday, after the lapse of two years from the death of the liferenter.” And, in virtue of this conveyance, the lands being of the requisite valuation, Mr Blair was inrolled as a freeholder in the county of Aberdeen.

In a complaint preferred to the Court of Session in the name of Sir William Forbes and several other freeholders in that county, it was

Pleaded: In a wadset, lands are conveyed to a creditor in security of money lent, and are to be retained by him till the debt be paid. And the difference between what is called a proper and an improper wadset is, That in the former the creditor, during the non-redemption, has the profits of the land for the use of his money; while, in the latter, as he is not obliged to content himself with the yearly produce of the lands, if not equal to the legal interest of the sums lent, so he may

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be

be called upon to account, and to renounce his right, if it shall appear that he has received enough for paying what is due to him. In both cases possession is an essential quality of the right, and therefore the wadset of a right of superiority, burdened with a liferent, where the lands are, of necessary consequence, occupied by the liferenter, must be quite irregular and inept; Stair, b. 2. tit. 10. § 9.; Erskine, b. 2. tit. 8. § 26.

Even although the constitution of such a wadset could be reconciled to feudal principles, it seems altogether inadequate to the establishment of a freehold-qualification. When the statute of 1681 gave a preference in this respect to proper wadsetters, over those having the right of reversion, it was because the former appeared to have the more substantial interest in the lands, and were in possession. But that reason is not applicable to a case such as this, in which the wadset may be followed with possession, for *two* years only, and that after the death of the liferenter, an event which may not occur during the lifetime of the present holder of the wadset-right. To rights of this sort it is impossible to imagine that the legislature ever meant to annex that valuable privilege; and so it seems to have been determined, 1st July 1773, Sir James Colquhoun *contra* James Hamilton.

Answered: A wadset is a right in lands subject to redemption, and may be distributed into as many parts as the most unlimited property. As it is possible to acquire an irredeemable right of fee, while the disponent either reserves the liferent to himself, or conveys it to a third party, so one may purchase a redeemable right under the same limitations. In all those cases it is only after the death of the liferenter that the fiar can enter into the full enjoyment of his right. But this circumstance cannot be thought any wise inconsistent with feudal ideas. And it seems to be equally unimportant, whether the right of liferent is or is not subject to the same privilege of redemption with the right of fee; Stair, b. 2. tit. 10. § 2. 10.

The other objection deduced from the statutes, relative to elections, appears to be equally ill founded. It is indeed to proper wadsetters, in exclusion of those holding other redeemable rights or conveyances in security, that the act of 1681 has appropriated the right of voting as a freeholder. And the true criterion of a proper wadset is, That the creditor has the use or produce of the lands, *unaccountably*, for the use of his money. But it is no where required, that this use shall commence at the same time that the money is advanced. And where a sum is to be lent in this way on an estate subject to a liferent, or other temporary incumbrance, the lender, it is to be presumed, will frame his bargain in such a manner, that the produce of the lands for the period during which he is intitled to possess, shall, on the whole, afford to him a sufficient compensation for his being deprived, during a certain time, of that part of his yearly income. In the case of Sir James Colquhoun *contra* Hamilton, the qualification does not seem to have been founded on a proper wadset, like the present, but on a disposition in security; and at any rate, the more recent determination of 23d February

March 1789.

COURT OF SESSION.

121

ary 1774, Mr James Colquhoun *contra* the Freeholders of Banff-shire, was agreeable to the argument maintained for the respondent.

A majority of the Court were of opinion, That such a wadset as the one in question did not give a freehold qualification.

The Lords found, " That the freeholders did wrong in admitting " Mr Blair to the roll, and ordered his name to be expunged," &c.

Mr Blair preferred a reclaiming petition, upon which, however, in consequence of certain subsequent proceedings, it became unnecessary to give any determination.

A&. Dean of Faculty, Wight, Hay, et alii.
Clerk, Gordon.

Alt. G. Fergusson, Tait, et alii.

C.

Nº LXVII.

March 6. 1789.

Sir WILLIAM FORBES, Baronet, and others,

— A G A I N S T —

Sir JOHN MACPHERSON, Baronet.

MEMBER OF PARLIAMENT.—Nominal and Fictitious,

SIR JOHN MACPHERSON, as liferent superior of certain lands of the requisite valuation, was inrolled as a freeholder in the county of Aberdeen.

Of this inrolment Sir William Forbes, and several other freeholders in the same county, complained to the Court of Session, in terms of the election-statutes, contending, That the rights on which Sir John Macpherson's claim was founded, were *nominal* and *fictitious*.

In order to shew that this was really the case, the complainers required Sir John to confess or deny,

1. Whether the conveyance of the lands contained in Sir John's titles was not made out without his previous consent or knowledge? At least, whether Sir John was not solicited by the Duke of Gordon, from whom he derived his right, to accept of a freehold-qualification?

2. Whether the expence of making out the title-deeds was not paid by his Grace?

3. Whether

3. Whether those title-deeds were delivered to Sir John before his enrolment? or whether they were in his possession at any time previous to this period?

4. Whether, when he was informed of the conveyance, he thought himself called upon to defray the expence of defending his title in the Court of Session, or elsewhere?

5. Whether he did not, when he accepted of this conveyance, and does not still, consider himself as in honour bound to vote for the candidate who may be patronised by the Duke of Gordon, and to renounce his freehold-qualification at his Grace's pleasure?

In the answers given in for Sir John it was maintained, That the particulars mentioned by the complainers could not be proved in the manner here proposed.

In deciding this matter two votes were put, 1st, Whether it was competent to examine Sir John on the proposed interrogatories? And, 2^{dly}, Whether, on account of the small value of the life-estate in a pecuniary view, as appearing from the face of the right itself, the freehold qualification was to be considered as nominal and fictitious? Both these questions were determined in the negative by a small majority. Accordingly

“ The Lords found it incompetent to put the questions to the respondent proposed by the complainers, and repelled the objection, of nominal and fictitious, to the respondent's qualification; and therefore dismissed the complaint.”

For the complainers, *Wight*, et alii.
Clerk, *Gordon*.

Alt. *Tait*, et alii.

C.

N^o LXVIII.

June 14. 1789.

DAVID SMYTH,

A G A I N S T

TRUSTEES of Dr THOMAS YOUNG.

THIRLAGE.—*How far extinguished, in consequence of the owner of the mill becoming proprietor of the astricted lands, or vice versa.*

THE lands of Kinvaid were anciently thirled to the mill of Drumfay, at a time when they belonged to different owners. In 1726, the grandfather of Mr Smyth of Methven became proprietor of both.

Even after this event, however, the tenants of the lands continued uniformly to pay the usual multures: And on this footing matters remained till the year 1765, when the lands of Kinvaid were sold, without any mention of the thirlage, to the late Dr Young. At this time, in some of the leases which were excepted from the warrandice, the payment of multures was expressly stipulated, while in others a reference was made to the possession held by the preceding tenants, all of whom actually paid them.

A doubt having occurred, whether the lands were to be considered as still astricted; Mr Smyth brought an action for payment of the multures, against Mr Oliphant, and several other persons whom Dr Young had appointed his trustees. The defenders

Pleaded: The servitude of thirlage must be completely done away, when the property of the mill and of the astricted lands is united in the same person, agreeably to the maxim, *Quod res sua nemini servit*. In this manner, when the pursuer's grandfather became purchaser of the mill of Drumfay, and of the lands of Kinvaid, the incumbrance with which the lands were formerly affected was for ever discharged. Since that period, indeed, those who were tenants of the lands have been obliged, by their leases, to carry their grain to their landlord's mill, and to pay the heaviest rate of thirlage. But in this manner the lands could not be burdened, but so soon as the leases expired, the contract of astriction, as appendant to them, was necessarily at an end; l. 1. D. *Quemadmodum servit amitt.*; l. 10. D. *Commun. præd. tam urb.*; l. 116. D. *De legat.* 1.; l. 30. D. *De servitut. præd. rustic.*; Stair, b. 2. tit. 7. § 16.; Bankt. b. 2. tit. 7. § 41.; Erskine, b. 2. tit. 9. § 36. 37.

I i

Answered:

Answered: Even with respect to what are properly termed real servitudes, the rule of law referred to on the other side, is far from being a universal one; but the question must in every case be determined according to the probable intention of the parties. If one is obliged to admit into his wall the beams which are necessary for supporting his neighbour's house, it never can be thought that this servitude, so indispensably useful, will not continue to affect the servient tenement in all after changes of the property. In the same manner, supposing the owner of a mill to have the privilege of an aqueduct through his neighbour's lands, which he afterwards purchases, how absurd it would be to imagine, that if he thereafter sells the lands, the right of aqueduct, though as requisite as ever for the use of the mill, was to be at an end?

But with regard to thirlage, which has been sometimes, though erroneously, classed among real servitudes, the maxim appears to be altogether inadmissible. Not only is it in the power of a proprietor, by restricting the tenants of his lands to his own mill, to establish a thirlage, which will in all time coming be a real burden on the lands; but where an restriction of this sort has once existed, it is necessary, in order to effect a liberation, in case of the proprietor's afterwards selling the lands, that they shall be disposed *cum molendinis et multuris*, so that a conveyance, in which a certain feu-duty is stipulated, *pro omni alio onere*, will not be sufficient to create an exemption; Craig, *lib. 2. diag. 8. § 7. 11.*; Stair, *b. 2. tit. 7. § 15. 16. 24.*; Bankt. *b. 2. tit. 7. § 38. 52. 53.*; Erskine, *b. 2. tit. 9. § 18. 21. 38.*

The judgement of the Lord Ordinary was in the following terms:

“ In respect it is admitted, that there was a separate constitution of
“ the thirlage in question before the property of the lands and of the
“ mill came both into the person of the pursuer's predecessor; and
“ that it is also admitted, that while the pursuer's predecessors were
“ proprietors both of the lands and mill, they took their tenants in
“ the lands bound in their tacks to come to the mill, and that they
“ came accordingly and paid intown multures; finds, That the lands
“ continued restricted to the mill after they were sold to Dr Young.”

After advising a reclaiming petition, which was followed with answers, the Lords “ adhered to the judgement of the Lord Ordinary.”

Lord Ordinary, Lord Justice-Clerk,
Clerk, Gordon.

A&C. Rolland, C. Boswell.

Alt. Stewart.

C.

N° LXIX.

N^o LXIX.

June 17. 1789.

JAMES FAIRSERVICE,

A G A I N S T

JAMES WHYTE.

PROVISION to HEIRS and CHILDREN.—*Destination of lands in a marriage-contract to heirs and bairns, how interpreted.*

THE father of James Fairservice, in his marriage-articles, disposed some lands of small value belonging to him to the *heirs* and *bairns* of the marriage. The obligation to infeft, the precept of feisin, and the assignation to the writs, as well as a clause respecting the conquest, were in favour of the *children* of the marriage.

Of this marriage there existed several children. James Fairservice, the eldest, after his father's death, obtained, from the superior of the lands, a charter, confirming the disposition from his father, and also containing a precept of *Clare constat*, wherein, on the narrative of its being shown by authentic documents, and by the charter of confirmation, that the bearer thereof was *nearest* and *lawful* heir of the deceased, he granted warrant for infeftment, &c.

James Fairservice being infeft in virtue of this warrant, sold the lands to James Whyte; who being charged for payment of the price, preferred a bill of suspension, in which he contended, That the devise being to "the heirs and bairns of the marriage," while all the subsequent clauses were in favour of the "children of the marriage," the lands sold to him did not belong to James Fairservice, but to the whole issue of the marriage, equally; and

Pleaded: Notwithstanding the favour which our law has shown to priority of birth, by interpreting the word "heirs," occurring in a settlement of land rights, as comprehending those persons in their order who are called to the intestate succession, yet where a testator has at the same time added other words which do not readily admit of such a construction, it has given way to a different rule. Thus, where the expression of "heirs and bairns of a marriage" has been employed, the practice has been, not only in the case of *feuda pecuniæ* and in that of burgage tenements, but also in the settlement of land-estates, to admit, without distinction, all the children of the marriage. In circumstances like the present, such an interpretation seems peculiarly proper, the whole relative clauses respecting this insignificant piece of land, which the proprietor could have no intention of perpetuating in

in his family, being in favour of "the children of the marriage," which cannot be understood to give any more right to the eldest son than to his younger brothers and sisters. And in another clause, that respecting the conquest, it will not be disputed, that the whole children of the marriage were meant, this having been determined in many instances: Dirleton, *voce* Heirs of Provision and Substitution; Stair, b. 3. tit. 5. § 52.; Dict. *voce* Provisions to Heirs and Children; 17th February 1736, Rankine *contra* Rankines; 13th June 1760, Scott *contra* Scotts.

Answered: Where in marriage-settlements sums of money are provided, it has been justly held, that if the destination is to the heirs and bairns of the marriage, the children will succeed *per capita*, because this would be the rule of distribution, if no settlement had been made. And the same thing is observed in giving effect to clauses of conquest, because tho' the subjects acquired may consist of land, still these must have been purchased with money, which, as a moveable subject, descends to executors. From some peculiar ideas too respecting burgage-tenements, it seems to be established in practice, that after conveying subjects of this sort in favour of the heirs and bairns or heirs and children of the marriage, the whole shall not belong to the eldest son, but shall be divided equally. But in the case of landed property, as the right of primogeniture has ever been firmly settled, so in marriage-settlements respecting it, it seems reasonable, that under the word "heirs" the eldest son should have a preference, even although it should be coupled with others of a more doubtful signification. Accordingly, although some decisions, chiefly of an ancient date, may be referred to, which appear to have deviated from the principles just now stated, the more recent ones, without any regard to the value of the subjects, which would afford a very uncertain rule, seem to have uniformly given a different effect to settlements of this sort: Sir James Steuart, *voce* Heirs of Provision; *Id. voce* Provision in favour of Bairns; Bankt. b. 3. tit. 5. § 48.; 13th February 1768, Kempt *contra* Ruffel; 23d November 1773, Home and Scott *contra* Murdoch and Miller; 18th November 1788, Jacobina Reid *contra* Catharine, &c. Woods.

The Lords found, That James Fairfervice, the eldest son of the marriage, was intitled to succeed to the lands in question.

Lord Reporter, *Justice-Clerk*.
Clerk, Sinclair.

A&A. Cha. Brown.

Alt. Geo. Fergusson.

C.

N^o LXX.

June 17. 1789.

JAMES FAIRSERVICE,

A G A I N S T

JAMES WHYTE.

SERVICE of HEIRS.—*Lands devised to the heirs and bairns of a marriage; not carried by a precept of Clare constat in favour of the eldest son, as nearest and lawful heir of his father.*

IN the question between these parties, it was stated for James Whyte, as another reason for with-holding the price of the lands sold to him, that although James Fairservice might succeed to the lands, as destined to the *heirs* and *bairns* of the marriage between his father and mother, he had not made up a proper title to them, the precept of *Clare constat* in his favour, as *nearest* and *lawful heir* to his father, being insufficient for this purpose.

As the general arguments were the same with those in the case of Reid *contra* Woods *, it is unnecessary here to repeat them. It was mentioned as a circumstance favourable to the validity of this precept of *Clare constat*, that it had a special reference to the charter of confirmation, in which the marriage-contract was recited. So that the intention of the superior to declare James Fairservice to be the heir there pointed out, could not possibly admit of dispute. On the other hand, it was observed by one of the Judges, and seemed to have considerable weight, that the imperfection in the precept of *Clare constat* having been observed during the lifetime of the heir, could be easily obviated; whereas, in the preceding case, it had become altogether incurable before any objection was made. Here, therefore, it was highly expedient, by refusing effect to the deed, to preserve, in the utmost purity, the forms of transmitting landed property.

“ The Lords found, that the precept of *Clare constat*, obtained by James Fairservice, was ineffectual to carry the lands in question; and therefore sustained this reason of suspension.”

Lord Reporter, *Justice-Clerk*.

Partibus ut supra.

C.

* *Vide supra*.

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N^o LXXI.

N^o LXXI.

June 18. 1789.

JAMES SHOOLBRED, and others,

A G A I N S T

WILLIAM OSBORNE.

PACTUM ILLICITUM.—PRISONER.—*It is illegal in the Magistrates of a Royal Burgh to stipulate an indemnification from prisoners in case of their escape.*

A Debtor, arrested in virtue of letters of caption, having been presented for incarceration to James Shoolbred, one of the Magistrates of Auchtermuchty, and the jail of that town being quite unfit for the reception of prisoners, it was resolved, for this purpose, to make use of the Court-house, which is immediately above the jail, but not secured, as a prison ought to be, with iron bars, &c.

In order to indemnify the Magistrates, in case of an escape, the prisoner indorsed to them a bill of exchange for L. 42, drawn by him and accepted by William Osborne. For this acceptance Osborne had received no value, it being solely intended to create a fund of credit to the drawer.

Very soon after the prisoner made his escape.—The Magistrates, in an action at the instance of the incarcerating creditor, were found liable for the debt. And they having sued William Osborne for payment of the bill indorsed to them, he, in defence,

Pleaded: The confinement of a debtor in prison is founded on a presumption, that by the *squalor carceris* he may be compelled to pay the sums due by him. To permit his escape is, in the contemplation of law, an injury to the creditor; and whether this has been owing to collusion or neglect, it implies a breach of duty in those who had him in custody. Hence it must be illegal for the Magistrates of a burgh to enlarge a person confined even for a civil cause, on getting any sort of assurance that they shall be relieved from the penal consequences following from it. And an agreement, such as occurred in the present case, whereby the Magistrates obtained a security in case of the prisoner's escaping, seems to be equally exceptionable. Indeed, when, after a stipulation of this sort, the debtor actually elopes, the one case can hardly be distinguished from the other. Thus the indorsation of the bill here sued on, having been obtained by means to which the law refuses its sanction, it must be considered as ineffectual; and the same defences, which, if the bill had

had been put in suit by the drawer, would have been good against him, must be equally so against his indorsees; Dict. *voce Pactum illicitum*.

Answered: When Magistrates are required to put a debtor in prison, they may pay the sums due to the incarcerating creditor, and then set him at liberty. In such a case, too, they may, with propriety, obtain every security that the debtor is able to give for their indemnification. In the same manner, when, from the insufficiency of the jail, there is reason to fear that the debtor may make his escape, the Magistrates may, with equal propriety, take every precaution that is necessary for their own security. So far from injuring the incarcerating creditor, such foresight must, in the end, prove beneficial to him. Where then can be discovered the illegality of the transaction here occurring; or what solid reason can be given for maintaining, that the Magistrates, who are unquestionably intitled to sue a person who has escaped from prison, in order to their recovering the sums paid to his creditors, may not, by a previous agreement, voluntarily entered into on his part, provide for their indemnification? Erskine, b. 3. tit. 2. § 31.; Kilkerran, 1st February 1749, Thomson *contra* Colvill.

“ The Lord Ordinary over-ruled the defences.”

After advising a reclaiming petition with answers, one of the Judges seemed to think, that independently of the alledged illegality of the transaction, the indorsation not being in security of a debt, but of a contingent or eventual claim, could not give the holder the privileges of an onerous indorsee. But the majority of the Court being of opinion that such an agreement as here occurred, if not absolutely illegal in its own nature, was of an improper tendency, and not to be permitted; it was on this principle that

“ The Lords altered the judgement of the Lord Ordinary, and sustained the defences.”

Lord Ordinary, *Dreghorn*,
Clerk, *Gordon*.

Ad. Blair.

Alt. Cullen.

C.

Nº LXXII.

N^o LXXII.

June 18. 1789.

JOHN THOMSON,

A G A I N S T

The KEEPER of the TOLBOOTH of EDINBURGH.

PRISONER.—*Whether jail-fees be due by persons imprisoned on a criminal accusation, as well as by those incarcerated for a civil debt.*

WILLIAM THOMSON, as charged with accession to the crime of forgery, was committed to the prison of Edinburgh; from which, about five months afterwards, he was liberated, on condition of banishing himself, but without having been brought to trial. Immediately before his enlargement the jailor demanded L. 7 as the prison-fees, which were so much the higher, that at the request of Thomson and of his friends he had been accommodated in the apartments of the civil debtors, instead of being put into that part of the prison which is allotted for criminals. For that sum John Thomson, the brother of William, granted his bill; of which however he instituted an action of reduction, on the ground of injustice and concussion; and

Pleaded: In the case of a person imprisoned for a civil debt, jail-fees, it is true, are exigible, and even the creditor-incarcerator is liable for them in the first instance; it being requisite that a fund for the jailor's subsistence should be thus provided. But imprisonment on a criminal accusation is to be viewed in a different light. If the party prove to be innocent, it would be hard, that after having suffered confinement unjustly for the public benefit, he should moreover be compelled to pay for the means of that suffering. On the other hand, if he be found guilty, and, by punishment, answer the demands of justice, it will belong to the public to defray all the expence necessary for accomplishing so salutary a purpose. Accordingly, though the Crown always pays for the aliment of prisoners accused of crimes, nothing is ever allowed by it in name of jail-fees; the obvious reason being, that the former is, but that the latter are not exigible.

Answered:

June 1789.

COURT OF SESSION.

131

Answered: The act of Parliament of 1701, cap. 6. provides, that any liberation from prison under its authority, shall be “ without prejudice to the keeper of the prison asking his dues as formerly before the making of this act;” the right of exacting prison-fees from persons accused of crimes being thus recognised. On that principle, the Court decided in the case of Rutherford and Gray, 14th June 1712, Fountainhall. And the constant practice of exacting jail-fees, indiscriminately, from all prisoners in the tolbooth of Edinburgh, appears from a table of those fees made up by the Magistrates, 17th July 1728.

The Lord Ordinary reported the cause.

A considerable number of the Court were moved by the circumstance of the jailor's having, at the desire of the prisoner and of his friends, allowed him an apartment in the debtors quarter of the prison, when otherwise he must have gone to that of the criminals, as if this implied a sort of paction for payment of the fees. Others considered the matter as fixed by the statute, decision, and usage, pleaded on by the defender; but independently of these, all seemed to acquiesce in the argument stated as above for the pursuer.

The Lords repelled the reasons of reduction.

Reporter, Lord Swinton.
Clerk, Colquhoun.

Ast. Dickson.

Alt. Geo. Fergusson.

S.

N^o LXXIII.

June 19. 1789.

EARL of DALHOUSIE,

A G A I N S T

SAMUEL GILMOUR.

PRESUMPTION.—Terms Legal and Conventional. *An annuity by a bond granted for a price, being payable at Whitsunday and Martinmas for the preceding half year; no part of it due for such half year, if the annuitant do not survive the respective terms.*

GILMOUR, in consideration of a sum of money, granted bond “ to
“ Dr Thomas Glen and his heirs, for an annuity or yearly pay-
“ ment of L. 32 Sterling, at the two terms of Whitsunday and Mar-
L 1 “ tinmas,

“ tinmas, by equal portions, beginning the first term’s payment at
 “ Whitfunday first, for the half year preceding, and the next term’s
 “ payment at Martinmas thereafter, for the half year preceding that
 “ term, and so to continue in the payment of the same at every sub-
 “ sequent term of Whitfunday and Martinmas in all time thereafter,
 “ during the natural life of the said Thomas Glen.”

Dr Glen died on *the second day of November*; and the Earl of Dalhousie, as his disponsee, sued Gilmour for payment of a part of the annuity corresponding to the period from the term of Whitfunday to that day.

The Lord Ordinary pronounced this interlocutor: “ Having attentively considered the bond libelled on, which does not constitute a liferent upon a sum of lent money, bearing annualrent *de die in diem*, nor binds the defender to pay the annuity thereby constituted, daily and continually during the annuitant’s life, but only to pay the said yearly annuity at two terms in the year, Whitfunday and Martinmas, by equal portions, (beginning the first term’s payment, &c.) during the natural life of the annuitant, with a fifth-part of each term’s payment of penalty, in case of failing in the payment thereof, and the due and ordinary annualrent of the said term’s payments from the time they respectively fall due, and during the not payment of the same; finds, That this annuity, similar to an obligation for the payment of rents of lands, being made payable half-yearly, at such of the terms of Whitfunday or Martinmas as might occur during the annuitant’s life, the defender was not bound to pay any part or proportion of the said annuity, at or for any intermediate period between those terms within which the annuitant died, or at any time occurring after his decease.”

In a reclaiming petition, which was appointed to be answered, the pursuer

Pleaded: The liferent-right of any subject, implies the liferenter’s title to the whole produce or profits of it which arise during his life; nor is it inconsistent with this, that for the sake of expediency liferents are usually made payable at a certain term. Thus, with respect to money, and all other subjects which yield profit or increase from day to day, the liferenter’s right keeps pace with that gradual progress, and the last penny which has thus accrued at the day of his death, tho’ the term-day be ever so distant, is due to himself or to his executors; Erskine, b. 2. tit. 9. § 66.; Dict. of Decis. vol. 2. p. 454. Lining *contra* Gustard, 20th February 1736. It is true indeed, that had the subject here liferented been lands, the fruits of which arise not *de die in diem*, there would have been no room for this claim, because then the profits, which are understood in law as *unum quid*, existing at one particular period not arrived, could not have been said to accrue prior to the annuitant’s death. But the liferent-annuity in question is that of a stock or sum of money; the circumstances, of a higher rate of interest than the legal one, and of the debtor’s being discharged of the obligation of payment, which are all that distinguish this

this from any other case of money bearing annualrent, being evidently of no consequence.

If the money paid by the annuitant were even considered as a price; this, which is the only other possible supposition, would lead to the same conclusion. For if it was the price of any thing, it was that of an alimentary provision, which, by its very nature, must be understood to correspond to the whole subsequent lifetime of the party for whose use it was destined. This is not only the reasonable presumption in the case, but likewise the legal one; *Ersk. loc. sup. cit.*; otherwise, and on the supposition that no proportion of the annuity was due prior to the term of payment, the annuitant, except on the term-day alone, could never be certain of obtaining a shilling for his subsistence at any period in the course of his life.

Answered: A sum of money, which is properly said to be *sunk* or extinguished, cannot, with any propriety, be deemed a subsisting stock. Here there was no stock to bear either continual or periodical profits. A price was indeed paid for the obligation in the bond; and that obligation was qualified by the condition, that the payments were only to be made at the terms of Whitsunday and Martinmas which should occur during the annuitant's natural life. The half year's annuity in question then could never become payable, as the corresponding term did not arrive till after his death. This *dies incertus pro conditione habebatur*. In like manner, when a provision is, by a marriage-contract, made payable at a certain term, before which the party for whom it is destined is predeceased, there is no room for any claim corresponding to the period which he did survive.

The Lords adhered to the interlocutor of the Lord Ordinary, sustaining the defence.

Lord Ordinary, *E/kgrove*.
Clerk, *Sinclair*.

A&t. *Rolland*.

Alt. *E. Armstrong*.

S.

N^o LXXIV.

June 20. 1789.

The PROCURATOR-FISCAL of the County of EDINBURGH,

A G A I N S T

THOMAS DOTT and ALEXANDER PATERSON.

PUBLIC POLICE. JURISDICTION.—*Act 1698, cap. 8. extends to those suburbs of the town of Edinburgh which are not subject to the jurisdiction of the Dean of Guild.*

THOMAS DOTT and Alexander Paterfon purchased a small piece of ground for building, bounded on the north side by the road leading from the College to the Infirmary, and on the west by Nicolson's street. This piece of ground, being part of the old barony of Broughton, is not subject to the jurisdiction of the Dean of Guild in the town of Edinburgh.

After the building was nearly finished, a complaint was preferred to the Sheriff-depute of the county, in the name of the Procurator-Fiscal, setting forth, That the directions of the statute of 1698 had not been observed, the houses being more than *five* stories above the level of the street. Answers were given in for the defenders, in which they

Pleaded: By the common law, every person may build on his property to any height, provided he does not occasion some danger to his neighbours from the insufficiency of the work. It is true, that in 1698, this common-law right was restrained in a certain degree within the *city* and *suburbs* of Edinburgh, the Dean of Guild, whose jurisdiction not only extends over the royal burgh, but to Canongate, Potter-row, including Bristo-street, &c, being directed to give out *jedges* and *warrants*, under the limitations therein prescribed. But this enactment cannot have any influence on the present question. The Dean of Guild cannot interpose, because the ground on which the buildings are erected does not lie within his jurisdiction. And the interposition of the Sheriff of the county would be equally improper, as the execution of the statute has not been intrusted to him, but to the Dean of Guild.

Answered:

Answered: The statute in question being founded in great expediency, ought not to be narrowed by a critical interpretation of its words. As the danger to be avoided from the exorbitant height of the buildings, is as great in the avenues to the town as in the town itself, the same rule ought equally to apply to both. Indeed the use of the word "suburbs," which is of an indefinite import, including whatever buildings, in the gradual enlargement of the town, may fall under that description, would be enough to show this to have been the intention of the legislature. As to the mention which is made of the Dean of Guild, this was only intended to press the observance of the law on that Magistrate, who, from the nature of his office, would have most occasion to attend to it, and cannot be thought to exclude the interposition of the judge ordinary in those cases where the Dean of Guild, from a limitation of his judicial authority, is prevented from interfering.

It was also *pleaded* by the defenders, That the buildings erected by them were not prohibited by the enactment, as they consisted only of *five* stories, what was called a *sixth* being no more than a French roof, including a tympany in the centre of the building.

The Sheriff Depute "repelled the declinature; and found, that "the building in question was one story higher than it ought to be, "and ordered the same to be reduced to five stories."

A bill of advocacy was preferred by Thomas Dott and Alexander Paterson, which being followed with answers, replies, and duplies, was reported to the Court.

The Lords remitted to the Lord Ordinary to refuse the bill.

Reporter, *Lord Hailes.*

Att. Solicitor-General.

Alt. Dean of Faculty.

C.

N^o LXXV.

June 26. 1789.

THOMAS WOOD, as Administrator-in-law for his CHILDREN,

A G A I N S T

THOMAS AITCHISON.

PROVISION TO HEIRS and CHILDREN.—*The issue of a child of a marriage intitled to her share.*

JOHN AITCHISON, the father of Thomas Aitchison, in his marriage-articles, became bound, during the subsistence of the marriage, “to lay out L. 400 upon land in Scotland, or upon other good “and sufficient security there, heritable or personal, for annualrent, “and to take the rights and securities of the land, or of such other security for annualrent as aforesaid, in favour of himself and his “wife, and longest liver of them, in liferent, and to the children or “child to be procreated betwixt them; whom failing, to the said “John Aitchison, his heirs and assignees whatsoever, in fee.”

Of this marriage there were four children, who survived their mother; but at the death of John Aitchison, the father, only one son, whose name was Thomas, was alive. Another of the children, however, a daughter, who had been married to Thomas Wood, left issue.

An action was brought by Mr Wood, as administrator-in-law for these children, against Thomas Aitchison, for having it found, that they had right to one half of the sums provided in the marriage-articles. The Lord Ordinary gave decret in favour of the pursuers.

The defender preferred a reclaiming petition, in which he contended, That although, in bonds of provision granted to children *nominatim*, and payable at the father's death, the right might transmit to the descendants of those who predeceased their father, the law was different where the provision was in favour of children *nascituri*. In that case, he contended, the children had only a contingent or eventual right depending on their surviving their father.

The Court were of opinion, that in all provisions of this sort the issue of children predeceasing the term of payment, were intitled to that share which their parent could have claimed. And therefore

The Lords refused the petition.

Lord Ordinary, *Justice-Clerk*.

For the petitioner, *Wight*.

C.

N^o LXXVI.

N^o LXXVI.

June 26. 1789.

GEORGE, &c. WILSONS,

AGAINST

JAMES WILSON.

TUTOR and PUPIL.—*A tutor obtaining, in his own name, a lease of lands formerly held by his pupils, accountable to them for the profits.*

THE father of the pursuers having died in the possession of a considerable farm, the defender undertook, in consequence of a faculty granted by the widow and other friends of the deceased, to manage their affairs. Afterwards the defender, as the nearest agnate, was appointed tutor, by the Barons of Exchequer, to the pursuers, who were in a state of infancy.

The defender then, apparently with the approbation of those connected with his pupils, entered into a bargain with the proprietor of the farm, whereby, after renouncing the subsisting lease, of which there were two years to run, he obtained a new one for fifteen years, in his own name, at an advanced rent of L. 20. This sum, during the two years of the former lease, he became bound to pay to his pupils. When there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years, on his agreeing to pay an additional rent of L. 30.

The defender having acquired, in this way, a fortune of several thousand pounds, an action was brought by George, &c. Wilsons, for obliging him to communicate to them the profits arising from those leases. The defender

Pleaded: It is true, that as a tutor cannot be *auctor in rem suam*, he is precluded in general from acquiring any property which had belonged to those under his protection, as well as from purchasing for his own behoof the burdens affecting it. But there is surely no reason for carrying this maxim of law any farther. And particularly where a tutor could not have brought upon his pupils the loss arising from a hazardous undertaking in which he has engaged, he ought not, on a successful termination of his enterprise, to be compelled to give up the whole benefit to them. This would be to introduce, from notions of equity, a species of the *leonina societas*, which our law has reprobated,

reprobated, even in those instances where it has been expressly agreed to. Thus, if it was a proper act of administration in the defender to give up the current lease, and, as he was not obliged in his tutorial capacity to become overseer of the farm, such a measure seemed indispensably necessary for the welfare of the pupils themselves, he cannot now be challenged for this proceeding. And even although he were, by the most rigid adherence to the above-mentioned maxim, to be made accountable for the profits of those two years, during which he might have possessed in their right, it never can be thought just to extend his obligation to those of the subsequent years. And so it seems to have been determined in the last report. 7th December 1771, *Parkhill contra Chalmers*.

Answered: The general rule is undoubted, that no person, while trustee or guardian for others, can acquire for his own behoof any right affecting their estate, or become master of those effects of which they are in possession. Let the transaction be ever so inconsistent with the situation of those under his care; let it be unpromising in the highest degree, so that he would not be allowed to charge the loss resulting from it to their account; still, if from thence a profit has arisen, he is obliged to communicate it; the law presuming, as he could not honestly avail himself of his knowledge of their affairs for enriching himself, that he never meant to do so. The circumstances of the present case cannot make room for an exception from the general rule. It was improper in the tutor, without some judicial authority, to surrender the lease which was current when he undertook the office. Had it not been given up, his pupils might till now have enjoyed the farm by tacit relocation, or in consequence of a new lease. And not only from his taking the new lease to himself, but also from his present opulence, derived solely from his farming operations, it is evident how extremely beneficial to them this would have been: *Craig, lib. 1. diag. 14. § 13.*; *Stair, b. 1. tit. 6. § 17.*; *Bankton, b. 1. tit. 7. § 39.*; *Erskine, b. 1. tit. 7. § 17. 19.*; *Principles of Equity, b. 2. ch. 2.*; *Act of Sed. 25th December 1708*; *20th March 1632, Laird of Ludquhairn*; *19th June 1745, Bee contra Biggar*; *6th March 1767, Earl of Craufurd contra Hepburn*.

Some of the Judges were of opinion, that the defender should only be obliged to pay over to the pursuers the surplus rents, this being the only advantage they could have reaped from the farm, without such a degree of personal industry and exertion on his part, as he was not called to bestow on their affairs. And all the Judges seemed to be of opinion, that in accounting for the profits, he would be intitled to an ample recompence for his labour and attention in cultivating the lands.

The Lords, after advising memorials, found, “ That the defender
“ was obliged to account to the pursuers for the profits arising from
“ the farm in question during the two years which were not run of
“ their

July 1789.

COURT OF SESSION.

139

“ their father’s lease, at the time of his death, and also during the
“ remaining thirteen years of the first tack, and during the whole
“ years of the second tack obtained by him.”

A reclaiming petition was preferred for the defender, insisting, that he should only be liable for the surplus rents.

After advising this petition, which was followed with answers, the Lords adhered to their former interlocutor.

Lord Reporter, *Dunfinnan*.
Alt. *Dean of Faculty*.

Att. Lord Advocate, *Solicitor-General*.
Clerk, *Menzies*.

C.

Nº LXXVII.

July 8. 1789.

CHARLES STEWART,

AGAINST

Miss SOPHIA HOOME.

TAILZIE.—*A prohibition to sell does not hinder an alteration of the course of succession.*

MR HOOME of Argaty made a settlement of his estate in favour of George Stewart his brother, and of a series of heirs in substitution, containing a prohibition, “ during the space of thirty years
“ next after the granter’s decease, to sell and dispoise, feu or wadset
“ those lands, or to contract debts or grant any deeds whatsoever,
“ whereby the lands, or any part of them, may or can be evicted by
“ adjudication or otherwise, without procuring the special consent, to
“ the making of such sales or contracting such debts, of certain persons named trustees for judging and determining the expediency
“ and reasonableness thereof.” This prohibition was accompanied with irritant and resolute clauses.

The eldest son of George Stewart having succeeded in his order, he, in his marriage contract, without requiring any consent of the trustees, formed a new line of succession, by virtue of which, upon his decease, though long prior to the lapse of the thirty years, the right of the estate

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estate

state was claimed on behalf of Sophia Hoome his daughter. In opposition to this claim, Charles Stewart, the heir under the entail,

Pleaded: The restraints or fetters of an entail are not, it is admitted, the subject of a *quæstio voluntatis*, but of strict legal interpretation. Thus, if to a destination of succession, a prohibition to alter has not been subjoined, the law, however apparent the maker's intention may be, will not supply the defect. Nay, a mere prohibition against altering the order of succession will not effectually hinder the contracting of debt, or even selling, notwithstanding that thus the entailor's purpose may be totally frustrated.

The present case however is very different. A prohibition against "selling and disposing, or doing any deed by which the lands may be evicted," not only in obvious consistency with its object, but in strict technical language, extends to every species of alienation as well as to a sale for a price. That general prohibition comprehends the particular one relative to an alteration of the course of succession, in the same manner as a whole does any of its parts. Otherwise indeed sale could never be effectually prohibited, as it might always be accomplished through the medium of a change of the destination. Accordingly a prohibition "to give away, dilapidate, or impignorate lands, or to allocate or to bestow them in fee or jointure to wives," was found an effectual bar to any alteration in the destined course of succession. Lord Strathnaver *contra* Duke of Douglas, 2d February 1728: See likewise Fac. Coll. 17th June 1756, Ure *contra* Earl of Craufurd.

Answered: If it could be maintained, that the prohibition to sell included that against the altering of the order of succession, because this last might eventually produce a sale; it would hold at least equally true, that where-ever such alteration was prohibited, selling, which would still more directly violate the purpose of the settlement, must be also debarred. It is therefore a mistake to suppose, that the former prohibition comprehends the latter.

In the case of Strathnaver, as the expressions of the entail, "give away, bestow in fee," &c. indicated gratuitous deeds, or those of settlement, these might be properly understood to have been debarred; but were that judgement more conformable to the opposite plea, it might be truly said, that at the period when it occurred, the law on this point was not so well fixed as it has been since rendered by an uninterrupted series of decisions; such as, Heirs of Campbell *contra* Wightman's Representatives, 17th June 1746, Falconer; Sinclair *contra* Sinclair, 8th November 1749, Kilkerran; Scott Nisbet *contra* Young, November 1763; Judgement of the House of Lords in the case of Edmonstone of Duntreath, 24th November 1769; determinations which, as in effect admitted on the other side, ought to regulate the present case, the distinction which was attempted having evidently failed.

Besides, the circumstance of the prohibitions being limited to a short period, is inconsistent with the intention of making a strict or proper entail.

The

July 1789.

COURT OF SESSION.

141

The cause was reported, when

The Court unanimously found, that the prohibition in the deed was no bar to the settlement in favour of Miss Hoome.

Reporter, Lord Monboddo.
Clerk, Gordon.

For Mr Stewart, Dean of Faculty.

Alt. Wight, Rolland.

S.

N^o LXXVIII.

July 11. 1789.

JANET CHURNSIDE,

AGAINST

JAMES CURRIE.

HUSBAND and WIFE. *A husband having left Scotland, his wife liable to personal diligence, as an unmarried woman, for debts contracted after his departure.*

THE husband of Janet Churnside having left Scotland in bankrupt circumstances, she entered into trade in order to maintain herself and her children.

Being charged with horning for payment of a bill of exchange granted by her to James Currie, she offered a bill of suspension, founded on the general rule of law, that a woman *vestita viro* could not, by any contract, subject herself to personal diligence.

This plea however was entirely disregarded, as inapplicable to a case like the present, where the debt had been contracted by a wife in her own name, while her husband was out of the kingdom. To refuse the ordinary legal compulsatories, in such circumstances as these, would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support.

The bill of suspension was refused by the Lord Ordinary. And

A reclaiming petition being preferred, it was refused without answers.

Lord Ordinary, Gardenston.

For the petitioner, John Erskine.

C.

N^o LXXIX.

N^o LXXIX.

July 23. 1789.

WILLIAM BLAIR,

A G A I N S T

The COMMON AGENT in the Sale of the Estate of KINLOCH.

PROCESS.—*Effect of a decret in absence—the defender, who had been personally cited, having died before any objection was offered.*

AFTER several adjudications had been led against the estate of Kinloch for sums of money owing by the proprietor, the predecessor of William Blair brought an action in the Court of Session for constituting his claim, this being only vouched by a bill of exchange more than six years due, and of course falling under the sexennial limitation introduced by the statute of 1772.

In this action the defender, who had been personally cited, did not appear, and a decret in absence was obtained, the extract of which bore, as usual, that “the Lord Ordinary found the points and articles in the summons relevant and proven by the writs produced, and held the defender as confessed on the points not thereby proven.” This decret of constitution was afterwards followed by a decret of adjudication, which also passed in absence.

In the ranking of the creditors, after the estate of Kinloch had been sold judicially, and after the death of the common debtor, it was maintained, that as the bill of exchange, on which the whole proceedings were held, had been cut off *quoad modum probandi*, nothing but an acknowledgement of the debt, on a judicial reference to oath, was sufficient for validating Mr Blair’s claim. In bar of this objection Mr Blair

Pleaded: Before the statute of 1672, every action in the Court of Session might be preceded by two summonses, and two citations. One of each of these was sufficient, if the claim was to be proved by written documents, and the citation might be given by any one whose name was inserted in the summons as Sheriff in that part, the only sanction annexed to it being, that if the defender failed to appear, the Lords would nevertheless proceed and pronounce decret. But if the claim was to be verified by witnesses, or by the oath of the defender, a second citation was necessary, which was given by a messenger at arms, in consequence of what was called “An act and letters,”
that

that is, the act or warrant of the Court, and the letters or second summons proceeding on it. By this second citation the defender was required to appear, "and to hear and see all necessary probation led, "and to give his oath of verity," under a certification, that if he did not he would be held as confessed, and that the Lords would give decree accordingly. While this practice continued, it was no doubt necessary, in order to a holding as confessed, that the defender should be served with this last summons, in which only the pursuer declared his intention of making a reference to oath.

But when, by the statutes of 1672 and 1693, those two sets of summonses and citations were thrown into one, and it was declared, that a summons modelled after the new form, and executed by a messenger at arms, should be equally effectual, in all respects, as those formerly used, a very different rule was observed. Since that period, instead of those special certifications, which used to be severally annexed to the first and second summons, the certification is quite general, in these terms, "with certification as effairs."—In consequence of this, where a defender has been personally cited, the Clerks in the Court of Session have uniformly considered themselves as warranted to insert in the principal part of the decree, or what is called the grand decerniture, a holding as confessed, in the same manner as if the defender had been cited in virtue of the second summons formerly used, and had failed to appear. And such a decree, if not challenged during the lifetime of the defender, has been held to be altogether unexceptionable. To sustain the objection therefore which has been offered, would shake the security of many rights, the validity of which has never hitherto been questioned; Stair, b. 4. tit. 2. § 2.; Dallas's Styles, p. 185. 188. 194.

Answered: The general rule undoubtedly is, that *actori incumbit probatio*; and hence a decree obtained in absence of the defender, and without evidence, is only effectual while it remains unchallenged; Sir James Balfour *voce* Reduction of Sentence; Craig, *lib. 3. dieg. 7. § 27.*; Stair, b. 4. tit. 38. § 28.; Dictionary, *voce* Process.

It is true, that where a pursuer is unprovided with any other mean of proof, he may in general resort to the oath of the defender, upon whose declining to swear, our law justly presumes, that he does really know the claim to be well founded. But for this purpose, it is indispensably requisite, that the defender should have had it in his power to swear that he owes nothing, otherwise the whole basis of this judicial compromise is wanting; Stair, b. 4. tit. 38. § 27.; Bankt. b. 4. tit. 33. § 7.; Erskine, b. 4. tit. 2. § 17.

Nor have the statutes of 1672 and 1693 made any alteration on this part of our law. Those statutes were made to abridge the forms of judicial procedure; but the rights of the parties still remain on the same footing. And as prior to those enactments, it was not enough for holding a defender as confessed, that he had been cited in virtue of the second summons, unless a formal reference had been made, no

reason can be given why the same rule should not still be observed. If it were to be established, that a decret in absence, supported by no evidence, was to be held *pro re judicata*, in case of the defender's dying before any challenge was made, this would not only in many instances be attended with injustice, but might open a door to infinite frauds.

In support of this general argument it was contended, that the defender, at the time when the decret was obtained, having been *vergens ad inopiam*, he would not have been allowed to offer any objection: so that the presumption arising from his silence was entirely done away.

The Lord Ordinary "sustained the objection."

But after advising a reclaiming petition, which was followed with answers, the Court, chiefly moved by the circumstance of the defender's having been personally cited, altered the judgement of the Lord Ordinary, and

"Repelled the objection to the claim entered by William Blair, and
"remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Ankerville*.
Clerk, *Menzies*.

Ast. Mat. Refs.

Alt. R. *Craigie*.

C.

N° LXXX.

July 23. 1789.

JOHN YOUNG,

AGAINST

The TRUSTEE for JAMES STEIN'S CREDITORS.

MOVEABLES.—Delivery *brevi manu*. Civil possession, how far attained by indorsation of bills of lading.

SANDEMAN and GRAHAM, merchants in London, were the consignees of James Stein a Scotch distiller, and as such intrusted with the sale of large quantities of spirits prepared by him for the London market. They had come under acceptances for Stein to a great amount,

amount, when he shipped for London, consigned, as was usual, a cargo of aquavitæ, of which he had indorsed and transmitted to them the bill of lading.

The vessel set sail, but was by contrary winds obliged to put back to her port. Mean time Sandeman and Graham became bankrupts, and their estate was vested in the assignees named under a commission then issued. Stein's bankruptcy likewise immediately followed, when a sequestration of his effects was awarded.

Young, as attorney of the assignees, appeared before the Admiral-Court, and insisted on the ship still proceeding to London under the consignment, alledging, that by the indorsation of the bill of lading a *jus quæsitum* had arisen to Sandeman and Graham. This claim being opposed by the trustee for Stein's creditors, who brought under review the judgement of the Admiral, which was in favour of the assignees; it was, for the latter,

Pleaded: Sandeman and Graham were creditors in relief to Stein. They were therefore intitled to retain for their security all goods of which, as his consignees, they had attained the possession.

Now when those in question were put on shipboard, the consignees, under the authority of the indorsed bill of lading, acquired the civil possession of them by means of the shipmaster or natural possessor; who, subordinate to them as having the sole right to call him to account, then held the custody to the same effect as if the ship had belonged to themselves, or as if the goods had been locked up in any other repository of theirs, while the key was in the pocket of some third party having their orders. For surely it cannot create any real distinction between that case and the present, that a situation the same in itself, has been here produced *brevi manu*, which there would have resulted from an actual delivery to Sandeman and Graham on the spot where the goods were shipped, followed by the circumstance of the shipping being performed by themselves. Such *brevis manus* tradition is universally understood to be effectual with respect to corn in a public granary, in which case, the buyer having no design of removing the grain, to employ a similar circuit terminating in the point where it began, would be absurd; and in regard to cargoes at sea, a situation in which any other delivery would be impracticable: Postlethwaite's Dict. *voce* Bill of Lading; Select Decis. Buchanan and Cochran *contra* Swan, 13th June 1764; Judgement of House of Lords, Hastie and Jamieson *contra* Arthur, 10th April 1770; Fac. Coll. 2d February 1787, Bogle *contra* Dunmore and Company.

In the practice of England, it is said, goods may be reclaimed by the seller from a bankrupt-purchaser while *in transitu*; but this supposes, that the former had lain under no previous obligation to give rise to a *jus quæsitum* in the latter.

Answered: It was solely for the behoof of Stein that either the consignment was made, or the bill of lading indorsed; so that prior to actual sale, this *mandatum gratia mandatarii* was revocable. It did not
in

in the least tend to divest Stein of his ownership. To attribute to the office of a factor such an extensive privilege as has been supposed, would be dangerous; and the idea is unknown in practice, as the opinion of Lord Mansfield, though given in a case of a different nature, plainly implies: Burrow's Reports, vol. 2. p. 941.

An indorstation on a bill of lading cannot be more effectual than a power of attorney, which it truly is in an abridged form. The only right it conveys is, that of demanding implement of the shipmaster's obligation; a right which, being accessory to that which the consigner has to the disposal of his goods for his sole benefit, must as such bear the character, without transgressing the limits of the principal. The *jus exigendi* thereby conferred is therefore totally different from the civil possession, which still continues to be held by the consigner; as was lately determined in the case of Allan and Steuart *contra* Creditors of Stein*.

The Lord Ordinary reported the cause, when

The Court "preferred the trustee on the estate of James Stein to the spirits in question."

A reclaiming petition was presented, followed with answers, and refused.

Reporter, Lord Dreghorn.
Clerk, Home.

Act. Rolland, Hope.

Alt. Macnochie.

* Vide *supra*, p. 84.

S.

N° LXXXI.

July 29. 1789.

JOHN LAMB,

A G A I N S T

ROBERT HIGH.

BURGH ROYAL.—*Non-resident freemen have no right to vote in the election of a deacon.*

JOHN LAMB, in terms of the statutes, 16 Geo. II. and 14 Geo. III. complained to the Court of Session, that at the annual election of Magistrates in the town of Kinghorn, in 1788, Robert High had been admitted

mitted as deacon of the tailors, whereas he himself had the only right to that office.

The circumstance on which he rested his argument was, that the Magistrates had unduly rejected, on account of non-residence within the borough, two persons as voters, whose votes would have been decisive in his favour.

Pleaded: After a franchise has been once constituted in favour of any class of men, nothing can debar the exercise of it, but either express statute or immemorial custom. Neither of these however can be stated, in order to exclude non-residing burghesses or freemen from their right of voting in the election of the town's officers, any more than it could prevent them from resuming their several occupations within the town, as soon as they find it convenient. Accordingly, although it has been specially provided, that the Magistrates should be *indwellers*, no such provision has been made as to the other citizens; and in many instances it has been found, that a non-residing burghess might enjoy the important office of counsellor, when the matter had not been otherwise fixed by the constitution of the burgh. Some determinations which may be resorted to in the case of Edinburgh are not applicable, these having been given in consequence of the peculiar set of that town, as regulated by a decret-arbitral pronounced by Lord Haly, and confirmed by the subsequent practice: Act 1487, c. 111; 1535, c. 26.; 7th January 1757, Burghesses of Forres *contra* the Magistrates, Kames's Remark. Decif. N^o 103.; 1775, Magistrates of Linlithgow.

Answered: The privileges belonging to burghesses and freemen have not been bestowed on them individually, but as inhabiting a certain territory, and in consideration of their peculiar usefulness to their fellow-citizens. As soon, therefore, as a burghess or freeman ceases to reside within the burgh, he is not permitted to exercise any of his former rights. In the election of the town's managers, it would be very inexpedient to give any influence to those who have no longer any interest in the welfare of the community. Hence it has been found, that a non-residing burghess had not the privilege of taking apprentices. In another case it was expressly determined, that a tradesman residing in Canongate could not be elected a deacon in the town of Edinburgh; and this was held to be law in a subsequent question: 1st December 1738, Macduff; 31st January 1764, Miller *contra* Nicolson; 1781, James Hunter-Blair *contra* Phin and Gilbert Meason.

“ The Lords dismissed the complaint.” *

For the complainers, *Alex. Fergusson, C. Hay, et alii.*

Alt. Hops, et alii.

C.

* The same decision was given in a similar question from the town of Kirkcaldy.

N^o LXXXII.

July 29. 1789.

JAMES DONALDSON, and others,

A G A I N S T

The MAGISTRATES of KINGHORN.

EXECUTION.—*In a complaint with regard to the election of a deacon, only necessary to call the Magistrates and Counsellors of the Burgh.*

JAMES DONALDSON, who had been chosen deacon of the bakers in the town of Kinghorn in September 1788, complained to the Court of Session, in terms of the statutes 16 Geo. II. and 14 Geo. III. that he had been prevented from voting in the election of the Magistrates for the ensuing year.

To this complaint the provost, bailies, and other members of the town-council, were made parties, without taking any notice of the members of the corporation of bakers, and also without summoning one Thomson, who, as *old deacon* of the tailors, had been present when the complainer was rejected by the Magistrates.

An objection on this ground was stated by the Magistrates and Town-Council to the formality of this complaint; in support of which they

Pleaded: In every judicial proceeding it is necessary that those who are immediately interested in the decision shall be brought into the field. It is true, that in prescribing the form of summons to be used in matters of borough-election, the legislature has required, that "the Magistrates and Counsellors elected by the majority" shall be cited, without particularly mentioning any other person. But it surely could not be meant by this, where the question was with regard to the election of a particular officer, that the party himself should not be cited; or that every one of those persons whose proceedings have been complained of, should not have regular notice of a litigation, in which, besides being subjected in expences, they may be deprived of their right of suffrage. Accordingly the practice has ever been, not only to summon the Magistrates and Counsellors, but also those who voted at the election at which the wrong is said to have been committed. And, where the choice of a deacon is the subject of dispute, the whole members of the particular corporation have been made parties.

Answered:

Answered; The method of summoning in causes of this sort has been wisely adapted to the circumstances of the case. By intimation to the Magistrates and other members of the Town-Council, it is to be presumed that the matter will be sufficiently known, to put every other person who has or thinks he has an interest on his guard; and this, independently of statutory forms, is all that is necessary. To require, that besides the Magistrates and Counsellors, who, as representing the community, have the chief and almost the only concern, the whole constituent members of the meetings for election in all the different corporations should be called, would occasion a great and unnecessary expence; and, at the same time, would almost, in every instance, be fatal to the proceedings, from the danger of omitting some person to whom intimation should have been made. A similar idea has been followed with regard to the proceedings in the courts of freeholders, where, though every one of the freeholders may be thought to have an equal interest, it has been made sufficient, to summon the person who is supposed to have been unduly put on the roll, or those by whom an objection has been made in consequence of which a freeholder has been excluded from his right of voting. As to the practice, supposing it to have been uniform, as it has proceeded from the unnecessary anxiety of the parties, it cannot have any influence; 1st August 1773, *Bell contra* the Magistrates of Inverkeithing.

The complaint was dismissed on other grounds, to be stated in the report which immediately follows: But

The Court were of opinion, that the form of the citation had been sufficiently regular.

*Act. Dean of Faculty, Wight, A. Fergusson, Cha. Hay. Alt. Lord Advocate, Solicitor,
Tait, Hep.*

C.

N^o LXXXIII.

N^o LXXXIII.

July 29. 1789.

JAMES DONALDSON, and others,

AGAINST

The MAGISTRATES of KINGHORN.

BURGH ROYAL.—*Where no deacon has been elected at the usual time, the next election must be authorised by the Magistrates.*

THE corporation of bakers in the town of Kinghorn had not elected a deacon for eight years preceding September 1788. At this time James Donaldson was chosen into the office; but on his appearing to take his seat in the Council, it was objected, that his election having proceeded without any previous authority from the Magistrates, was unwarranted and void.

The Magistrates having sustained this objection, James Donaldson and his adherents complained to the Court of Session, in terms of the statutes 16 Geo. II and 14 Geo III.; and

Pleaded: Where no Magistrates have been chosen on the day fixed for that purpose, it is understood that an application must be made to the King for authorising a poll-election; and hence it may be thought, that where a corporation has omitted to chuse a deacon, a similar application ought to be made to the Magistrates, from whom the different corporations have received their privileges. But the distinction between the two cases is sufficiently obvious. The authority of the Magistrates, who in general have a power of chusing their successors, is only for a year, and after the elapsing of that period, without a new nomination, there is no one who can proceed to an election. But in the case of the subordinate communities within borough, where the right of election is in the members of the corporation, as this must subsist as long as there is a member capable of enjoying the privileges belonging to it, so where for one year no deacon has been chosen, there is nothing to hinder the members of the corporation, after due premonition, to meet and chuse their office-bearers, in the same way as where a deacon regularly chosen happens to die during his office. In such a case it is usual for the members of the corporation, without any warrant from the Magistrates, to meet for the purpose of chusing his successor; l. 7. §. ult. D. *Quod cujuscunque universitatis nomine*; Bankt. lib. 1. tit. 2. § 27.

Answered:

July 1789.

COURT OF SESSION.

151

Answered: The only difference in this matter between the election of Magistrates and that of a deacon is, that the Magistrates deriving their authority from the Crown, it is necessary, where no election has been made on the day fixed by the charter of the borough, to apply to the Sovereign for a warrant to proceed to a new election; whereas the lesser communities within the borough having been originally created by the Magistrates, it is to them that an application is to be made, when, in consequence of a failure to elect at the time appointed for that purpose, the corporation is without its ordinary representative and manager. In both cases, where the regulations laid down in the original formation of the society, as to chusing the office-bearers in it, have not been observed, it is indispensably necessary to obtain a special warrant for that purpose; because it is in virtue of those regulations alone that any one member of the community can pretend to any pre-eminence over his fellow-citizens. To admit a contrary practice would occasion much inconvenience and disorder.

Reference was also made by the respondents to a decision of the Court in 1770 or 1771, not collected, where the question appeared to have been determined agreeably to the argument maintained by them.

“ The Lords dismissed the complaint, and found expences due.”

Aff. *Wight, Hay, et alii.*

Alt. *Tait, et alii.*

C.

Nº LXXXIV.

July 29. 1789.

JAMES FALCONER,

AGAINST

ALEXANDER HAY.

BASTARD.—TACK. *A tack granted to a bastard, excluding his assignees and subtenants, does not pass to the Crown's donatar.*

JAMES FALCONER having let part of his lands to a person born out of wedlock, “excluding his assignees and subtenants;” the question occurred, after the death of the lessee without children, Whether the tack could be assigned by the King to a donatar.

Qq

For

For trying this question, James Falconer brought an action of removing against Alexander Hay, who had been appointed by the Barons of Exchequer to manage the affairs of the deceased till a donatar should be named. The pursuer

Pleaded: A tack granted without mention of assignees or subtenants, must cease on the death of the tacksmen, if he leave no heirs. A lease, therefore, granted to one born out of wedlock, on his dying without children, must be at an end, the right of the Crown in the effects of such a person being of the nature of an *escheat*, and not arising from any title of *succession*. Indeed, even although the King were in this case to be considered as an *heir*, the same consequence would follow, as he cannot in his own person fulfil the obligations exigible by the landlord; while, from the exclusive nature of leases, which, in the present instance, is fortified by an express stipulation, it is equally out of his power to assign his right to another; l. 1. 4. C. *De bon. caduc.*; Craig, *lib. 1. dieg.* 16. § 30.; Skene, *De verb. signif. voce* Bastard; Balfour, *voce* Bastard, § 2.; Sir James Steuart, *ibid*; Stair, b. 3. tit. 3. § 44. 47.; book 4. tit. 13. § 1.; Bankt. b. 3. tit. 3. § 99.; Dict. *voce* Personal and Transmissible; 25th January 1788, Alison *contra* Proudfoot and Litster.

Answered: Where effects are without an owner, either because they have never been appropriated by any person, or because the former proprietor has dereliquished them, they are said to belong to the Crown, as *bona vacantia* or *caduca*. But where this happens in consequence of the demise of the owner without lawful heirs, the King is properly said to take the effects as *ultimus hæres*, his royal prerogative, as the *pater patriæ*, rendering him the rightful successor to such of his subjects as have no other. All this however seems to be of little importance. Whatever is capable of transmission to heirs, is understood, in circumstances such as here occur, to be transmitted to the Crown; and the restrictions which formerly precluded the free power of disposal, are no longer of any avail; it being an established rule, as the King cannot act in a subordinate capacity, that, when in consequence of forfeiture, escheat, or otherwise, he comes into the right of an estate holding of one of his subjects, he may transfer it to a donatary, although the former owner had no such power. Thus, before the late statute abolished wardholding, the King could transfer a ward-fee holding of a subject, without any danger of recognition; and at present his donatary is authorised to demand a renewal of the investiture without any obligation to pay a year's rent to the superior, which every other singular successor must do.

The Court seemed to be of opinion, that even where no mention has been made of assignees and subtenants, the King coming in the place of the tacksmen *ob defectum hæredis*, could not transfer the right to a donatar; and therefore, after advising memorials for the parties,

“ The

July 1789.

COURT OF SESSION.

153

“ The Lords decerned in the removing.”

Lord Reporter, *Rockville.*
Clerk, *Gordon.*

Ast. *Elphinstone.*

Alt. *Wight.*

C.

N^o LXXXV.

July 30. 1789.

TRUSTEES of ROBERT KER,

AGAINST

CREDITORS of MAINSNEIL.

RES JUDICATA,—*How far effectual against creditors.*

IN an action brought by the proprietor of the lands of Mainsneil, for setting aside an adjudication which had been led by the predecessor of Robert Ker, it was determined that the adjudication was informal and inept. But as it was not disputed that the sums for which the adjudication had been led were truly due, the Lord Ordinary, on 17th January 1784, and afterwards the whole Lords, found, that, *in the circumstances of the case*, the adjudication was to subsist as a security for the principal sums and interest, without accumulations or penalties.

Afterwards the proprietor having contracted debts to a great amount, the lands were sold judicially. In the ranking which ensued, the creditors objected to Robert Ker's adjudication on the same grounds which had been formerly urged.—In answer to these objections, the trustees of Robert Ker, he himself being at the time abroad,

Pleaded: By the judgement of the Court, pronounced *in foro contentioso*, it has been found, that the decret of adjudication was to a certain extent a good and effectual step of diligence. This is a *res judicata*, which neither the common debtor, nor those coming in his right, can afterwards call in question. It would indeed be extremely unreasonable if a contrary decision were to be given; as in this manner, by a very natural reliance on the judgement of a Supreme Court, a party might be entirely precluded from the most just claim. Had
it

it been found that the adjudication was ineffectual, the creditor might of new have used the proper methods of attaching the lands. This reasoning at least must be quite decisive in a question with those who became creditors after the adjudication had been sustained by the Court.

Answered: The rule, *Quod res judicata pro veritate habetur*, only takes place where the parties are the same. The judgement, therefore, pronounced in the question between the common debtor and the adjudger cannot here have any influence. It is also evident, that the *ratio decidendi* in the former litigation, resting on the circumstances of the case, is quite inapplicable to the present argument. In a question with the common debtor, there was no harm in sustaining the adjudication as a security for those sums which were confessedly due. This was of advantage to both parties, by avoiding those expences which would have been incurred in leading a new adjudication. These considerations, however, are of no weight in a competition of creditors, who are intitled to plead every objection, however minute, that can enlarge their fund of payment. In a question, particularly, respecting the transmission of landed property, it would be dangerous to give effect to a decret of any Court, which enters into no proper record for publication, so as to affect the rights of creditors and *bona fide* purchasers.

The Lords, after advising informations, pronounced this judgement.

“ Find, that the judgement of the Court, sustaining the adjudication at the instance of Robert Ker’s predecessor, as a security for the principal sum and interest, is to be held as a *res judicata*; and therefore repel the objection to the adjudication.”

But upon advising a reclaiming petition, which was followed with answers,

The Lords “ found, that the adjudication at the instance of Robert Ker’s predecessor was only to be sustained as a proper step of diligence, in a question with those creditors whose debts were contracted after the judgement of the Lord Ordinary, of date 17th January 1774.”

Reporter, Lord Rockville.
Clerk, Home.

A&T. Blair, Cha. Hay.

Alt. Rolland, Hope.

C.

N° LXXXVI.

N^o LXXXVI.

July 30. 1789.

CREDITORS of Sir JAMES DUNBAR,

AGAINST

Sir GEORGE ABERCROMBY.

RIGHT IN SECURITY.—BANKRUPT. Act 1696. *An heritable security for sums paid posterior to its date, but prior to the delivery of it to the creditor, valid.*

IN autumn 1774, Sir Robert Abercromby, the predecessor of Sir George, having agreed to advance L. 5000, on 20th December ensuing, to Sir James Dunbar, upon a security over his estate; an heritable bond for that sum was executed in the month of October, and in November infestment followed. The bond and the instrument of feisin were deposited in the hands of a person who was the man of business of both the parties.

The money was advanced at different times until spring 1775, when, the sum of L. 5000 having been completely paid, the heritable security was delivered up to Sir Robert Abercromby.

In a competition of Sir James Dunbar's creditors, it was objected, that as this money had not been all advanced prior to the date, either of the bond or of the infestment, they, being so far a security for a future debt, fell under the sanction of the statute of 1696, cap. 5. And in support of the objection it was

Pleaded: The sum of money, in security of which the bond was granted and the infestment taken, not having been paid for several months posterior to the date of the latter, it was, in the terms of the statute, as much a future debt as if the payment had not been made for years after. In the case of Kinloch against Dempster, 13th June 1750, a preference claimed under an infestment in security of L. 20,000, was restricted to L. 8000, that part of the money which only was paid prior to its date, Kames's Rem. Dec.; and in the late case of Pickering *contra* Smith*, an infestment, in security of money to be drawn in consequence of a cash-credit with a banker, was not sustained.

* Supra, p. 25.

R r

Answered:

Answered: If securities for future debts had not been precluded, the enactment of the statute of 1696 respecting the *sixty days* prior to bankruptcy, must have become nugatory, as often as the precaution was taken of having such previous securities ready to supply the place of those prohibited. But as an artifice of this kind, the security in question could never be employed. None of the parties ever meant that it should be given or received for any future debt, and in fact it was not delivered sooner than the whole of the money was paid; it having been retained till then in the custody of the granter's agent, who happened, which is a circumstance of no moment, to be likewise the agent of the creditor. The delivery no doubt was posterior to the date of both the bond and the infestment; but this was equally necessary, and consistent with the regular practice of business. By that practice, which is essential to the absolute safety of the creditor, the debtor, before he receives his money, must have the bond executed, the infestment taken, and the latter likewise put on record; so that in such cases it is the date of the delivery of the security which is alone considered.

The decision in the case of Kinloch regarded a future and uncertain debt; the ground of that judgement, as stated by Lord Kilkerran, being, that neither the residue of the sum had been paid, nor the holder of the security laid under any such obligation to pay it, as could be the subject of diligence to the granter or his creditors; *Kilk. voce Personal and Real*, p. 393. The same observation is applicable to the case of Pickering *contra* Smith.

The Lord Ordinary sustained the objection.

But a reclaiming petition having been presented, and afterwards a hearing in presence appointed,

The Lords repelled the objection.

Lord Ordinary, Swinton.
Clerk, Gordon.

A&T. Wight, et alii.

Alt. A. Abercromby, et alii.

S.

N° LXXXVII.

N^o LXXXVII.

August 6. 1789.

T H O M A S H I G H,

A G A I N S T

R O B E R T M A I N.

BURGH ROYAL. *Disqualification from voting, arising from holding an office within the burgh at the will of the Magistrates.*

WILLIAM CHAPMAN had been appointed town's officer and trade's officer, and John Chapman jailor, in the town of Kinghorn, all of these offices being revocable at the pleasure of the Magistrates.

In a complaint, therefore, in terms of the statutes 16 Geo. II. and 14 Geo. III. preferred by Thomas High, it was contended, that the votes given by these men in electing Robert Main into the office of deacon of the weavers in that town in exclusion of the complainer, should not be reckoned. The complainer

Pleaded: It is necessary for preserving the independence, as well as the purity of elections, that those persons whose livelihood depends on the will and pleasure of others, should not be admitted to vote. This was provided by the act of the Convention of Estates in 1689, c. 22. which must be considered as declaratory of the common law. It is also ordered, in every warrant that has been issued for a poll-election. And although sometimes, in practice, this rule does not seem to have been sufficiently attended to, yet in the later decisions a due regard has been paid to it; 1775, Andrew Paul *contra* Alexander Frazer.

Answered: It would be carrying the system of political freedom, and the purity of elections, to a great length indeed, if the circumstance of a burghers having an office dependent on the Magistrates, were to incapacitate him. No such regulation however exists. The directions prescribed in the act of convention, as well as the warrants for poll-elections, which are merely temporary in their nature, suppose the general law to be different; and though the decisions on this point are far from being uniform, those examples in which the objection

jection was over-ruled, as being more agreeable to justice, ought now to be followed.

Some of the Judges being unwilling to deprive any man of his right of voting without a positive regulation or immemorial usage, were inclined to repel the objection; but the majority, moved by the late decisions, being of a different opinion,

“ The Lords sustained the objection to the votes of John Chapman as jailor, and of William Chapman as town-officer and trades-officer; and found, that their votes ought not to have been taken in the election of the corporation of weavers in Kinghorn upon 26th September last,” &c.

For the complainer, *Dean of Faculty, Alex. Ferguson, et alii,*

Alt. Tait, Hope, et alii.

C.

Note, A similar determination was given in several other questions of the same kind.

DECISIONS
OF THE
COURT OF SESSION.

Nº LXXXVIII.

November 14. 1789.

CREDITORS of JAMES STEIN,
AGAINST
NEWNHAM, EVERETT, and COMPANY.

RIGHT IN SECURITY.—BANKRUPT.—Act 1696, cap. 5.—GENERAL
BURDEN.—*Heritable security for a cash-credit set aside.*

BY disposition and assignation followed with infeftment, Stein made over to Newnham, Everett, and Company, an heritable bond for L. 12,000, as “ a security for the reimbursement of such sums of money as should be drawn from them by orders, receipts, accepted bills, or promissory notes, for behoof of John Buchanan and Company,” (a partnership with which Stein had a concern), in consequence of a credit or cash-account which Newnham, Everett, and Company was to give to them.

Of this conveyance, as having been “ granted for security of debts to be contracted for the future,” the creditors of Stein, who had become bankrupt, instituted a reduction on the statute of 1696.

On the part of the defenders, the topic sometimes resorted to, of a supposed analogy between the unquestionably valid infeftments, for
S f relief

relief of cautionary engagements, for real warranty, or for guarantying the due discharge of offices of trust, and such securities as are granted for future debts, was insisted on; an analogy which, it was answered, fails in this, that in all the former instances, a debt is constituted, but in the last case there is nothing but an agreement to lend money, which forms no debt.

The late decision of Pickering *contra* Smith and others, was particularly appealed to, as being exactly in point for the pursuers; to which, nothing new having occurred in the argument, it is sufficient to refer *.

The cause was reported by the Lord President as probationer, who observed, That the extent of the cash-credit being indefinite, there was a separate ground for annulling the conveyance, agreeably to the judgement of the House of Lords in 1734.

It was likewise observed, That expediency could hardly be urged in support of the right under reduction, as bank-transactions, being of a momentary nature, require all those expeditious methods of recovering money which personal securities admit, but which are inconsistent with the tedious process of ranking and sale, so often necessary before any benefit can be derived from heritable security.

The Lord Ordinary having "found, That the investment for security of Newnham and Company could not avail them for any sums paid, or obligations undertaken by them, *posterior* to the date thereof,"

The Court adhered to that interlocutor; but remitted the cause to the Lord Ordinary to hear parties on the farther effect of the objection of an indefinite burden.

Lord Ordinary, Swinton.

Aft. Maconochie.

Alt. Hay.

Clerk, Colquhoun.

S.

* Vid. *supra*, p. 25.

N^o LXXXIX.

November 17. 1789.

Mrs HELEN SCOTT,

A G A I N S T

ARCHIBALD and JEAN JERDONS, and their Tutors and Curators.

IMBECILITY.—PROOF.—*What degree of Imbecility sufficient for setting aside settlements Mortis Cauſa.*

AN action was brought by Mrs Scott, the niece and heir at law of Mr Jerdon of Bonjedward, for ſetting aſide certain deeds executed by him in the year 1783, in favour of Archibald and Jean Jerdons, his grandchildren by a natural daughter.

It appeared, that the teſtator had for ſome time treated the mother of the defenders with little kindneſs; but after her marriage in 1777 with Thomas Caverhill, which met with Mr Jerdon's approbation, he entirely changed his meaſures with regard to her. In 1778 he made a ſettlement of his lands, one ſmall parcel only excepted, in favour of her and the heirs-male of her body, with a ſubſtitution in favour of the children of Mrs Scott, his niece.

Afterwards in 1781, on the death of his daughter, who had born two children, Archibald and Jean Jerdons, Mr Jerdon made another ſettlement in favour of his grandſon, and the heirs-male of his body, with a ſubſtitution in favour of Mrs Scott's family. To his grand-daughter he alſo bequeathed L. 2000, beſide other legacies to ſome of his other friends.

In 1783, the ſettlements laſt mentioned were amiſſing. This circumſtance being aſcribed to Mrs Scott's interference, by thoſe about Mr Jerdon's perſon, who were in the intereſt of his grandchildren, was very diſpleaſing to him. A renewal of the ſettlements was propoſed by the writer by whom the former ones had been framed; and this being agreed to by Mr Jerdon, a new deed was prepared and executed, whereby, on the narrative of the former deeds having been abſtracted or miſlaid, Mr Jerdon's whole property was deviſed to Archibald Jerdon his grandſon, and his heirs and aſſignees, with a deſtination in favour of Mr Jerdon's heirs in caſe of his grandſon's predeceaſing him. By ſeparate deeds executed a few days after, Mr Jerdon named tutors and curators to his grandchildren, and he likewiſe renewed the legacy in favour of his grand-daughter Jean Jerdon.

At this time Mr Jerdon was in his 95th year. Before he executed the firſt ſettlements in favour of his daughter and her children, he had more than once been affected with a paralytic diſorder, which for

a while rendered him quite unfit for business, and long afterwards continued to impair his memory so much, that his conversation and writings were often extremely indistinct, and sometimes unintelligible. It clearly appeared too, from the evidence of the writer employed in extending the deeds in 1783, as well as from the testimony of other witnesses, that neither Mr Jerdon, nor the writer himself, foresaw that the effect of the writings signed by him would be, in the event of the old gentleman's predeceasing his grandson, to prefer Thomas Caverhill the father, and the other relations of his grandson, and even the King himself as *ultimus hæres*, to those whom, on all former occasions, Mr Jerdon had called to his succession.

Mr Jerdon lived till the year 1786; and from several transactions which took place after the date of the last settlements, it appeared that he was perfectly satisfied with what he had done, so far as related to his grandchildren.

For the pursuer it was

Pleaded: In the transmission of property from the dead to the living, the will of the owner ought to be the governing rule. And, no doubt, where a settlement appears duly authenticated and expressed in unequivocal terms, the legal presumption is strongly in its favour. If, at the time of executing the deed, the testator was in the full possession of his faculties, it would lead to the most dangerous consequences, were the testimony of witnesses, however numerous and respectable, to be listened to for setting it aside, or for giving it an effect contrary to the legal meaning of the words occurring in it. But, on the other hand, it seems to be not less just, to prevent those who are placed beside the aged and infirm from availing themselves of such artifices as may be successfully practised on persons in this enfeebled state, in order to substitute what they wish instead of the will of the owner. If it appear that the settlement as made is really different from the one which the testator meant to execute, the very principle on which last-wills are justly held sacred requires that no regard should be paid to it.

It is not necessary for annulling destinations of succession, any more than it is for setting aside a mutual agreement, that the granter was in a state of absolute incapacity, or that they were brought about by such a degree of fraud and deception as might have misled those who are in the full possession of their intellects. It may not perhaps be so easy in the one case as in the other, to discover, from the intrinsic nature of the deed, that degree of weakness or imposition which led to the making of it. But in both cases alike it will be enough to shew, that the whole originated in error and mistake; and where it appears that the granter, though not wholly deranged, was much enfeebled in mind, those circumstances which otherwise could not be supposed to have any improper influence on his conduct, will be attended to in determining what effect the settlements ought to have. In the present case, the testator, in the imbecility of great age, and labouring under the effects of disease, seems to have been made to entertain groundless suspicions
against

against those who had formerly been favoured by him; and thus, while unable to attend to consequences, he was induced to put his hand to a settlement not truly authorised, because not fully understood by him; nor had it even been duly weighed by the writer of it. So far indeed as it introduced an essential alteration in the succession of his estate, it seems impossible for a moment to believe that it met with his approbation, or can be justly considered as his will. In many former cases, similar circumstances appear to have been fatal to settlements of this sort; such as those of Dallas *contra* Dallas in 1773, of Brown *contra* Chalmers in 1778, and of Crawford *contra* Doomside, also in 1778.

Answered: It must be admitted to have been the will of the deceased, that his own offspring, though illegitimate, should inherit his fortune. It must be likewise admitted, that the testator's mind was not so wholly debilitated as to render him incapable of making settlements of his affairs; and if so, the validity of those that he has made, which are authenticated in the most regular manner, cannot be disputed. Even although it were proved, that in the framing of it the writer had gone beyond his instructions, this cannot derogate from its validity, the testator's subscribing the deed being sufficient evidence of his intention to regulate his succession in the manner there pointed out.

Were it enough for setting aside a deed, that the testator himself, or the person employed to frame it, did not understand or foresee all the remote consequences which might possibly result from the destination, and if such allegations were to be established by parole-testimony, the most approved principles of our law would be overthrown, and no settlement could ever be secure from challenge. Though landed property cannot be devised without written documents, and these framed in such a manner as to shew, that the testator was able and desirous to regulate his succession, it would thus be in the power of inattentive, unmindful, or false witnesses, to disappoint the most deliberate settlements, and to substitute in their place a destination wholly inconsistent with the wishes of the proprietor; Duke of Hamilton and Earl of Selkirk *contra* Douglas, in 1776.

After advising memorials, counsel were heard; and the Lords, by a very narrow majority, sustained the defences.

A reclaiming petition was preferred, which was followed with answers, when the former judgement was altered, and the deeds set aside.

But after advising a reclaiming petition for the defenders, with answers for the pursuer, the Lords returned to their first opinion, by sustaining the defences.

Reporter, Lord Dunsman.
Alt. Wight, Blair, Abercromby, Armstrong.

Att. Lord Advocate, Dean of Faculty, Solicitor-General.
Clerk, Gordon.

T t

C.
N^o XC.

N^o XC.

November 17. 1789.

TOWN-COUNCIL of ROTHSAÿ,

A G A I N S T

N I E L M A C N I E L.

PROCESS.—RES JUDICATA.—Act 16. Geo. II. cap. 11.—*A decree having been extracted, before expences, though awarded, were modified, and without any reservation of them being made; not competent afterwards to demand decerniture for them.—Nor any distinction in the case of statutory costs by 16. Geo. II. cap. 11.*

A Complaint at the instance of Macniel, a counsellor of the borough of Rothsay, against the election of its magistrates and council, was dismissed, and costs of suit, according to the terms of the statute of 16. Geo. II. cap. 11. awarded. Before these were modified, however, the Town-council caused the decree to be extracted; and some time after this, they craved a decerniture for the expences.

Macniel having then objected, that by the extracting of the decree the cause had been finally removed out of Court, so that it was too late to make any claim in it, whether for expences or any thing else; the Magistrates and Council

Pleaded: When any interlocutor of a court has been regularly reduced into the form of an extracted decree, the jurisdiction of the court, so far as that judgement extends, is no doubt closed, and the cause thence removed. But with respect to subsequent proceedings, the powers of the court remaining entire, judgement may be pronounced in the same manner as if no extract had been given out. Thus, by extracted acts and commissions, the point respecting the allowing of a proof is irreversibly fixed, and so may be said to be out of Court; and yet the cause, in respect of all future questions that arise in it, continues as open as ever to its decision. Nor are any parts of a cause more separate, than the question of expences is from any one that regards the merits.

Were this not the case, it is plain, as either party may obtain an extract, that thus, where-ever expences had been awarded without being modified, the party found liable might easily elude the payment.

In the present instance, the rule ought to hold *a fortiori*: For the awarding of costs being enacted by a special statute, this circumstance seems in a peculiar manner to strengthen the distinction between

tween the respective determinations concerning the merits, and the expences.

Answered: An extracted decree on the merits of a cause puts a period to the proceedings, and then, instead of a depending action, a *res judicata* takes place. It is true indeed, that by special authority of Court, a decree, which is denominated for that reason an *interim* one, may be extracted under the reservation of farther procedure; but this specialty concerns not the present case, where no such authority was given. Acts and commissions form no exception, being in their nature nothing more than a preparatory step to the determination of a cause.

Neither surely can it create any distinction, whether a judicatory shall have decreed expences in obedience to a particular statute, or in conformity to the rules of common law.—Haldane and others *contra* Holburn, 4th August 1761, Fac. Coll. 10th March 1788; Douglas and Milne *contra* Elphinston.

The Lords sustained the objection; and adhered to this judgement on advising a reclaiming petition and answers.

For Macniel, *Solicitor-General Blair, Jo. Clerk.* Alt. *Dean of Faculty.* Clerk, *Sinclair.*

S.

Nº XCI.

November 20. 1789.

JAMES-ANNE MACDOWALL, and others,

A G A I N S T

ARCHIBALD MACDOWALL, and others.

JURISDICTION.—*Nobile officium of the Court of Session.*

THE grandfather of James-Anne Macdowall executed a deed, conveying his landed property to certain persons, and to one or more of them as trustees, and to their assignees and disponees, excluding their heirs and executors; whom failing, by death or non-acceptance, to his only son James Macdowall, his heirs and assignees.

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The purposes of the trust were,—the payment of the granter's debts, which were considerable;—the settlement of a suitable annuity on his son;—the sale of so much of the lands as might be necessary;—and the borrowing of money.

And it was declared, “ That after payment and extinction of the debts and obligations owing and payable by the granter, and after deduction of all necessary charges laid out in the execution of the trust, the trustees, or a quorum of them accepting, or the last survivor of them, should be obliged to denude of the lands, &c. to and in favour of James Macdowall the granter's son, and the heirs whatsoever to be procreated of his body; whom failing, to Elisabeth Macdowall the granter's daughter, and the heirs whatsoever of her body; whom failing, to the heirs named in a separate deed executed by the granter.”

Of the trustees thus named, only two undertook the management: one of these afterwards died; and the other, who was a merchant, having become bankrupt, an action was brought after the death of James Macdowall, the granter's son, who had left one daughter James-Anne Macdowall, for obliging the surviving trustee, on account of his insolvency, to convey the subjects to James-Anne Macdowall, or to any other person to be named trustee by the Court. At this time the trust-estate was very much incumbered, so that the same extensive powers which had been given to the trustees, seemed to be necessary for its management. James-Anne Macdowall was an infant, and her mother had been appointed *factrix loco tutoris* to her, in virtue of the act of federunt in 1756.

Some of the Judges were of opinion, that bankruptcy, unless attended with circumstances of fraud, did not incapacitate a trustee, although it might authorise those interested in the management to require some security from him; but the majority seemed to be of a different opinion. As, however, the trustee was desirous of giving up the office, the determination of the Court in this case cannot be considered as entirely decisive on this point.

As to the nomination of a new trustee, it was observed, that at an early period, the Judges in the Court of Session had exercised very extensive powers, in supplying the defects of family-settlements and trust-rights, as well as by giving particular instructions to those who had been named by them for managing the estates of persons under age, or labouring under other temporary disabilities. But of late much more caution had been used; and now it was only in the case of trusts created by statute, or where, as in estates destined to charitable uses, no person had any immediate interest in the management, that the Court would interpose in this manner.—*Fac. Coll.* vol. 2. N° 83. 24th July 1783, Paton.

The interlocutor was in these terms:

“ The Lords having advised the mutual informations for the parties, find the trust-right in question at an end by the bankruptcy
“ of

“ of the surviving trustee, and the death and non-acceptance of the
 “ other trustees, and decern and declare accordingly; and find the
 “ surviving trustee bound to denude of the trust-funds vested in his
 “ person, in favour of the pursuer James-Anne Macdowall; and de-
 “ cern.”

Reporter, Lord Justice-Clerk.

A&S. Wight.

Alt. George Fergusson.

Clerk, Home.

C.

N^o XCII.

November 24. 1789.

GEORGE HARKIES,

A G A I N S T

WELSH and CUMING.

POINDING.—Res inter alios.—Jurisdiction.—*The property of a third party being poinded, may be reclaimed without the necessity of a reduction.*

WELSH and CUMING caused a poinding to be executed, of a number of horses in the possession of John Hogg their debtor. Among these, there was one which proved to be the property of Harkies, as had previously been intimated by Hogg.

Harkies having brought an action of spuilzie for having the horse restored, &c. the sheriff of the county before whom the cause came, pronounced this judgement: “ In respect it appears, that at the time
 “ of the poinding, the horse libelled was in the possession of John
 “ Hogg the debtor, and that there is a regular execution of poind-
 “ ing produced, finds, that it is beyond the jurisdiction of the court
 “ to set aside that poinding, and therefore dismisses this action as in-
 “ competent.”

The pursuer presented a bill of advocacy, on which the following deliverance was given by the Lord Ordinary on the bills: “ Finds,
 “ That as the poinding was *res inter alios acta* as to the complainer,
 “ who was no party to it, it cannot affect him in any respect, and
 “ consequently that he is not obliged to bring a reduction of it, or
 “ precluded from bringing an action for recovering possession of his

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“ horse

“ horse in any way competent to him before it was executed ; there-
 “ fore refuses the bill, and remits to the sheriff, with instruction to
 “ vary his interlocutor, sustain process at the complainer’s instance,
 “ and do therein as to him shall seem just.”

In a reclaiming petition it was argued, in the words of Lord Kames, That “ a poinding is of the nature of a decree ; it is a sentence of a
 “ competent judge, adjudging and decerning the goods to belong to
 “ the creditor ; and this decree cannot be taken out of the way
 “ otherwise than by a proper reduction,” Remark. Decis. from 1730 to 1752, p. 104. And this doctrine it was endeavoured to support by the authority of Lord Stair, who denominates the messenger “ Judge
 “ in the execution of poinding,” b. 4. tit. 30. § 6. ; and of Mr Erskine, who states “ the adjudication and delivery by the messenger,
 “ as vesting the creditor with the full right of the goods,” b. 3. tit. 6. § 24.

The Court were unanimous in the opinion, that in such cases it is competent for the owner to reclaim his property in a petitory action ; and an illustration was given from the adjudication of lands that did not belong to the debtor, where the proprietor, without resorting to an action of reduction, would be entitled to be affoizied from a process of mails and duties at the instance of the adjudger.

The petition was therefore refused without answers.

Lord Ordinary, *Dreghorn.*

For the Petitioner, *Elphinston.*

S.

N^o XCIII.

November 27. 1789.

ANNE ARBUTHNOTT,

A G A I N S T

ARCHIBALD COCKBURNE.

SERVICE AND CONFIRMATION.—*Adjudication by a general disponee, without confirmation, ineffectual, although preceded by a decret in foro.*

MR COCKBURNE, as the general disponee of his father, instituted an action of debt against the Representatives of Archibald Allan. The defenders admitted, that the sums had been owing to the pursuer's father; but they contended, that the demand should be restricted, in consequence of certain claims of compensation.

Mr Cockburne having obtained a decret, proceeded, without being confirmed, to adjudge certain lands which had belonged to Archibald Allan: And this circumstance was urged for excluding him from any share of the price of these subjects.

It was considered in general as a fixed point, that a decret obtained by a nearest in kin or general disponee, was incomplete without a confirmation, 26th February 1782, Marshall *contra* Watson; 26th November 1784, Lennox *contra* Grant; 28th June 1785, Creditors of Park *contra* Maxwell. The only doubt was, Whether the proceedings in this case importing a judicial acknowledgement of the pursuer's title, were not, with the decret following thereon, to be held as equivalent to a bond of corroboration, so as to supersede the necessity of a confirmation, 19th June 1782, Watson *contra* Marshall. It seemed to be the opinion of most of the Judges, that if the defenders in the action had agreed to dispense with the want of a confirmation, the adjudication might have been sustained. But as nothing of this sort appeared,

“ The Lords sustained the objection to the adjudication, and found
“ that Mr Cockburne was not entitled, in virtue thereof, to be ranked on the estate in question.”

Reporter, Lord Henderland.

A&A. M. Refs.

Alt. Abercromby.

Clerk, Mitchelson.

C.

N^o XCIV.

N° XCIV.

December 1. 1789.

CREDITORS of ALEXANDER GRAY,

A G A I N S T

ROBERT GRANT.

PREScription.—FOREIGN.—PROOF.—*Parole-proof of the payment of money inadmissible.*

ALEXANDER GRAY having succeeded as heir to his brother John Gray, a claim was made in the ranking of Alexander's creditors after his death, for Robert Grant, on account of certain sums of money paid by him in London to John Grant, brother of William Grant of Quebec. The payments were made, it was said, in consequence of a letter of guarantee by John Gray, in which he engaged himself as surety for repayment of the money which Robert should advance "for fitting out John Grant to India, and as the price of goods which the latter had carried out to Quebec in the preceding year."

In a process of constitution against the representatives of Alexander Gray, Robert Grant, in proof of his account of the money so advanced in London, had previously produced two witnesses, one of whom, as it appeared from his testimony, had an active hand in the transaction, and in the absence of John Gray had, as his attorney, settled the account with Robert Grant; and both he and the other witness, who likewise swore to a complete cause of knowledge, verified the claim to its full amount. The former witness too mentioned, that John Gray had in several letters explicitly approved of the payments made to John Grant, and that he gave those letters to Alexander Gray for his information, who never returned them.

Though decree was obtained in that action, yet being *res inter alios acta*, it could have no effect against the creditors; and besides, the process was so far irregular that it was not preceded by a general charge.

The Creditors farther objected, That parole-evidence was in this case altogether inadmissible; for that in order to support the allegation of the payment of money, some written document was necessary; but here the only writing was the letter of guarantee, which, though it might authorise a payment to the extent of a reasonable allowance for an *outfit* to India, and of the other article mentioned, afforded no sanction to the remainder of the account to a far greater amount, even if the payment had been established.

To this, so far as respected the proof of payment, the *answer* was, That the evidence brought would have been fully sufficient in England,

land, which was the *locus contractus*, parole-proof of the payment of money being there admitted in all cases; and therefore it ought to be equally received in this country, when the validity of the English contract comes to be tried here. Vid. Dict. of Decis. *voce* Foreign.

It was likewise objected, That the process of constitution not having been raised until more than six years had elapsed after the money was all advanced, the claim was precluded by the English sexennial limitation; as it was also by the Scotch triennial prescription, which, after the death of John Gray, had run against Alexander while in Scotland.

The answer, however, seemed satisfactory, that William Grant in Quebec was the heir of John Grant the debtor, and against him neither the English nor Scotch prescription could run; and the debt thus preserved against the principal debtor, subsisted equally against the co-obligant John Gray and his representatives.

The Court, on the report of the Lord Ordinary, pronounced this interlocutor:

“ Repel the plea of a *res judicata* stated for Robert Grant; also repel the objections stated by the Creditors of Alexander Gray to the debt in question, founded upon the statute of limitations in England, and upon the triennial prescription in Scotland: Find, That the claim of the said Robert Grant upon the letter of guarantee from John Gray now deceased, can only extend to the sums which John Grant had occasion for to fit him out for the East Indies, and to the payment of sundry goods carried out to Quebec the year preceding the letter of guarantee for account of William Grant: Find, That the claim made by the said Robert Grant cannot be supported by parole-evidence; and therefore that the proof founded upon by him in support of his said claim, is neither competent nor relevant, and refuse to sustain the same.”

Reporter, Lord Stairsfield.
Mitchelson.

For the Creditors, Murray.

Alt. Buchan-Hepburn.

Clerk,

S.

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Nº XCV.

N° XCV.

December 4. 1789.

AMELIA LAMONT,

A G A I N S T

The CREDITORS of LAUHLAN and ARCHIBALD LAMONT.

PERSONAL AND REAL.—*Sums with which a conveyance of lands was burdened, found to be preferably secured in a question with the Creditors of the disponent, though no infeftment had followed.*

LAUHLAN LAMONT, in case of his dying without male-issue, conveyed his lands of Auchagoyle to Archibald Lamont, burdened with the payment of his debts, and a legacy of L. 100 to each of his three sisters.

The precept of feifin accompanying this conveyance, was declared to be granted under the following among other conditions: “ That in the event of Archibald Lamont or his heirs attaining possession of the lands, he or they should pay the disponent’s lawful debts, and the sum of L. 100 Sterling to each of Isabel, Grizel, and Amelia Lamonts, the disponent’s sisters; which sums to the said three sisters should be paid within twelve months after the disponent’s decease, with a fifth part more of penalty in case of failure, and annualrent of the principal sums from and after the time of the disponent’s death, during the not payment; and which sums were, in the event of their becoming due, declared to be real burdens upon the lands till paid off.”

After the decease of Lauchlan Lamont and of Archibald Lamont, the disponent, who never executed the precept of feifin in his favour, the creditors of both proceeded to attach the lands of Auchagoyle. Among others, Mrs Amelia Lamont obtained a decreet of constitution against the heirs of Archibald Lamont for the L. 100 due to her; and after using general and special charges, she instituted a summons of adjudication, which was conjoined with a previous one brought by another creditor.

In the ranking which followed, Mrs Lamont having claimed a preference over those creditors who were not really secured, the common agent objected, and

Pleaded: There can be no permanent burden on landed property without infeftment; and therefore the legacies in question, though intended to be made real, must be considered as obligatory on the grantee only. By taking infeftment without any notice of the legacies,

cies, it was in the power of the grantee to defeat the testator's purpose; and his creditors, who attach the rights that belonged to him, without any obligation to fulfil those engagements he may have come under, cannot be affected by them. The situation of the legatees, even if they had been authorised to take infeftment, must have been the same, until they were actually infeft, as if they had obtained an heritable bond on which no feisin had ever followed. But as it was not put in their power to complete their right in this way, it would be equally inconsistent with the established law, and with the design of the public registers, if any preference were now to be given to them, Dict. vol. 2. p. 70. 71.

Answered: It is true, that no incumbrance can be laid on landed property which does not enter one or other of those records which have been prepared for the purpose. It may also be admitted, that in this case Archibald Lamont, in whose favour the conveyance was granted, by executing the precept of feisin, without any notice of those burdens which were meant to accompany his right, might have placed the legatees in the situation of personal creditors only. But as no infeftment has followed, and as his creditors coming in his place cannot warrantably proceed to take infeftment, without ingrossing in the feisin those conditions which were annexed to the grant, the question must here be determined in the same manner as if the right had been completed by the disponee himself, as it ought to have been. In such a case it will not be disputed, that the sums due to the legatees would have been a real burden on the lands.

The question having been reported on informations, the Judges were unanimously of opinion, That Mrs Lamont had a preferable right.

The cause having been remitted to the Lord Ordinary, his Lordship pronounced an interlocutor in favour of Mrs Amelia Lamont.

Reporter, Lord Justice-Clerk.
W. M. Bannatyne.

For the Creditors, A. Macdonald.
Clerk, Menzies.

For Mrs Lamont,

C.

N^o XCVI.

December 4. 1789.

Mrs AMELIA LAMONT,

AGAINST

The CREDITORS of LAUHLAN and ARCHIBALD LAMONT.

HERITABLE AND MOVEABLE.—*A sum of money declared to be a burden on lands, how transmissible.*

ADJUDICATION.—WRIT.—*An adjudication on an unstamped writing, if remediable.*

M^{RS} GRIZEL LAMONT, to whom L. 100 had been left in the terms mentioned in the preceding report, made her last-will and settlement, "whereby she bequeathed to her sister Mrs Amelia Lamont, " all goods and gear, of whatever denomination, of which she was " possessed, or might be possessed at the time of her death."

The settlement proceeds in the following words: " And whereas " I have reason to believe, that Lauchlan Lamont of Auchagoyle, " my brother, has made a deed in favour of certain persons; and in " particular, that by the said deed he has burdened his estate with a " certain legacy or sum of money to be paid by his heirs, executors, " and assigns, to me, my heirs, executors, and assigns; I therefore " hereby declare, by this my last-will and testament, the said Mrs " Amelia Lamont, my sister, to be my sole heir, executrix, and assignee, reserving a power to myself to revoke this deed whenever I " think proper." This settlement was written on paper not stamped.

After the death of the testatrix, Mrs Amelia Lamont obtained a decree of constitution against the heirs of Archibald Lamont, who was burdened with the payment of this legacy, the sums bequeathed to her sister being included in the same decerniture with those originally due to herself. On this decret adjudication followed.

It was therefore objected by the common agent in the ranking, 1st, That considering the legacy of L. 100 as a burden on the lands, it could not be conveyed by a testamentary deed; and, 2^{dly}, That the settlement not having been extended on stamped paper, the decreets of constitution and adjudication were ineffectual, and this not only as to the sums bequeathed by Mrs Grizel Lamont, but as to the whole, agreeably to the decision, Apparent Heir of John Porteous *contra* Sir James Nasmyth, 4th February 1784.

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Some of the Judges seemed to think, that the right of the legatee was of a moveable nature, but the majority considered it as heritable. This, however, was thought to be of little consequence, as the deed, though purporting to be a testament, contained such expressions as were deemed fully sufficient for the conveyance of a debt, which, though a burden on landed property, was transmissible by assignment. The objection arising from the writing not being stamped, was considered as one that could be removed at any time.

The cause was remitted to the Lord Ordinary, with an instruction to sist process till the deed was stamped. After this was done, the Lord Ordinary pronounced an interlocutor, repelling the objections which had been stated to the claim of Mrs Amelia Lamont.

Reporter, Lord Justice-Clerk.
Clerk, Menzies.

Adv. Macleod-Bannatyne.

Adv. A. Macdonald.

C.

N^o XCVII.

December 13. 1789.

ELISABETH and JEAN SINCLAIR,

AGAINST

ROBERT SINCLAIR.

PRESCRIPTION.—SERVICE OF HEIRS.—*A service once sufficient, not rendered invalid by a supervening alteration in the state of the right.*

THE lands of Duncansbay, Warfe, and others, were purchased in the year 1741 by William Sinclair of Frefwick, from Malcolm Groat the apparent heir, who became bound to make up a proper feudal title in his person, and then to convey. The minute of sale also contained an assignation to the maills and duties; and “for the farther security of the purchaser,” a precept of feisin was inserted, and Frefwick was immediately infeft.

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After

After this, however, several creditors of Malcolm Groat, and among others Mr Sinclair of Freswick himself, led adjudications against the lands. These adjudications were preceded by special charges. And the whole being vested in Mr Sinclair, he, in 1755, obtained a decret of declarator of the expiration of the legal. Mr Sinclair died in 1769, after having conveyed to his only son John Sinclair the whole debts due to him, and the adjudications following on them.

Immediately after his father's death, John Sinclair obtained from Malcolm Groat, from whom the lands of Duncansbay, &c. had been purchased, a new conveyance, which contained, as formerly, an obligation to make up titles. This conveyance was accompanied with a precept of feisin, but no infeftment followed. Mr Sinclair also expedite a special service as heir to his father for carrying the estate of Freswick, and was infeft. In 1775 he executed an entail of his whole estates, including the lands which had been purchased from Malcolm Groat, in favour of Robert Sinclair his cousin, to the exclusion of Elizabeth and Jean Sinclairs, his sisters, and heirs at law.

John Sinclair, the maker of this settlement, having died in 1784, it was brought under challenge, so far as related to the lands of Duncansbay, &c. by his sisters. In support of this challenge it was

Pleaded: William Sinclair having been infeft in the lands purchased by him from Malcolm Groat, it was necessary, for authorising his son to make any alteration in the succession, that they should be duly transmitted to him by service and infeftment.

It appears to be of no importance, that the person from whom William Sinclair's infeftment was derived was merely an apparent heir unentered. Until the infeftment was set aside as flowing *a non habente*, it was the title by which the succession of the lands was necessarily regulated.

Even although the investitures in the person of William Sinclair were to be considered as inept, they would have been at any time rendered complete by the disponent's making up titles, agreeably to the rule, that *Jus superveniens auctori, accrescit successori*. At any rate, every objection to their validity was removed before John Sinclair the son's death, in virtue of the positive prescription; and thus the question must be viewed in the same light as if they had been originally unexceptionable.

It may perhaps be said, that in consequence of the special service completed for the purpose of carrying the lands of Freswick, it being understood to comprehend a general service of the same kind, the other rights affecting the lands of Duncansbay, &c. consisting of the adjudications, followed with a declarator of expiration of the legal, were properly transmitted from William Sinclair to his son, so as to authorise a disposal of them. This, however, would be altogether erroneous. The minute of sale, with the infeftment on it, being the *jus nobilius*, necessarily absorbed and carried along with it all the subordinate

ordinate rights. Indeed, had those rights been of the same nature, the priority of the minute of sale would have given it the ascendant over the rest, an innovation of the possession never being presumed.

Very singular consequences might ensue, if a different determination were to be given. The adjudications being merely incumbrances on the property, may be liable to many objections; or if the decret of expiration could be set aside, they might be cleared off by possession. Were an action therefore to be brought by the person against whom the adjudications were led, or by his creditors, the heir of the infestment in favour of old Freswick would alone be intitled to plead the positive prescription, by which only such an action could be precluded; while the institute in the entail executed by his son, though preferred to the heirs of old Freswick, would be obliged to surrender the lands to those whose right was inferior to theirs. Our law cannot sanction proceedings so obviously inconsistent and absurd; Erskine, b. 3. tit. 8. § 47.

Answered: The infestment in favour of old Freswick, having been derived from one who was not owner of the lands, was an insufficient title of property; and on this footing, unless it could be shown that the seller had afterwards completed his own right, matters must have stood at the time when young Freswick succeeded to his father. The only voluntary right then belonging to old Freswick, being no more than an obligation to make up feudal titles, and to convey the lands, might, as well as the adjudications, to which indeed young Freswick had right by special conveyance, be transmitted by a general service, or by a special service, as including a general one of the same kind.

If, therefore, the proper methods were taken for carrying to John Sinclair the rights belonging to his father as they stood at the time, it is of no consequence that, by the aid of prescription, a more complete and unexceptionable title of property has been since established. It never could be intended by this statutory privilege, to render invalid the rights of those in whose favour it had been introduced. It must be in their power either to avail themselves of it or not, as is most convenient for them: And it is evident from the whole proceedings of old Freswick and his son, that their purpose was to rest on the other titles in their persons which were liable to no objection.

The rules which have been mentioned for explaining the nature of the possession held by one who has in his person different titles to possess, cannot have any weight in such a case as this. It is true, that in general a man having attained possession under one title, cannot afterwards impute it to another, in a question with him from whom his possession flowed. But in a competition with every other party it is a fixed point, that one having in his person many titles to possess, may ascribe his possession to the one which is most beneficial to himself; and in questions of succession, it is the will of the possessor, if expressed with sufficient clearness, which must ever be the governing rule; Kilkerran, *voce* Prescription.

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The Lord Ordinary “repelled the reasons of reduction.”

And after advising a reclaiming petition for the pursuers, which was followed with answers, the Lords unanimously adhered to that judgement.

Ordinary, Lord Dreghorn.

Act. Dean of Faculty.

Alt. Macarochie.

Clerk, Mitchelson.

C.

N° XCVIII.

December 15. 1789.

THOMAS ELLIOT,

AGAINST

JOHN ELLIOT.

ARBITRATION.—Ultra vires compromissi.—An arbiter in a settlement of accounts, having involved with the subject of the submission a similar settlement between himself and the parties-submitters, the decret, though from thence the transaction did not appear, was found null.

JOHN ELLIOT and THOMAS ELLIOT entered into a submission to Elliot of Whitehaugh and two other arbiters, the object of which was to settle accounts betwixt the parties-submitters. It appeared to the arbiters, that the sum of L. 74 was due by Thomas to John; but in their decret-arbitral they decerned for L. 62 only.

It happened that Whitehaugh was creditor to John for L. 12, and debtor to Thomas for a larger sum; and the design of the arbiters was, that John's debt to Whitehaugh should be deducted from the sum to be awarded in his favour against Thomas, while the amount of the debt by Whitehaugh to Thomas was proportionally diminished. Accordingly Whitehaugh granted to John a receipt for the L. 12, and to Thomas a bill for the L. 62. Of this transaction, however, no notice was taken in the decret-arbitral, though stated in minutes formed by the arbiters.

The decret-arbitral was challenged by Thomas in processes of suspension and of reduction, on this ground, That the settlement thus effected was not only *ultra vires compromissi*, but inconsistent with that impartial and disinterested situation of arbiters relative to the matters at issue, which the law holds as essential to their character;—
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the pecuniary interest of one of the arbiters being here involved in their determination.

The Court seemed to be clearly of opinion, that nothing unfair was intended or could be occasioned by the proceeding in question; but that nevertheless it was necessary to give a check to every thing that tended to create any bias in the delicate situation of arbiters; and therefore

The Lords adhered to the Lord Ordinary's interlocutor, which found, " That it was not only *ultra vires compromissi*, but a very improper conduct in one of the arbiters, to settle accounts betwixt him and the two parties submitters; this settlement having been executed before the decret-arbitral was signed, by one of the parties granting a receipt to the arbiter, and the other a bill to him."

A reclaiming petition against the judgement of the Court was appointed to be answered, but afterwards refused.

Lord Ordinary, *Monboddo*.

Act. Dean of Faculty.

Alt. G. Fergusson.

Clerk, Home.

S.

N^o XCIX.

December 20. 1789.

PATRICK LAING,

AGAINST

JAMES WATSON and JOHN MOLLISON.

REPARATION.—PUBLIC OFFICER.—MEDITATIO FUGÆ.—*Damages found due for an irregular interposition of a meditatio fugæ warrant.*

PATRICK LAING insisted in an action of wrongous imprisonment and of damages against James Watson, a creditor of his, and against John Mollison the provost of the borough of Brechin, and one of the justices of the peace in the county of Forfar.

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It appeared that Patrick Laing was in bankrupt circumstances, and had disposed of most of his effects in the borough of Brechin, with a view of removing to another part of the country, though there was no reason to suspect that he meant to quit Scotland; and that James Watson applied to Mr Mollison for a warrant to imprison Laing, stating, that he was *in meditatione fugæ*, and intended soon to leave the kingdom, *at least that part of it*; and with regard to this James Watson made oath.

It farther appeared, that the desire of the petition was granted, without taking the oath of Watson as to the amount of the debt, without any previous examination of Laing, and without any limitation as to the time within which any action was to be commenced against him. Laing was confined to prison for several months. No proper measures however were taken by him, for some time, in order to obtain his release; and it even appeared, that he was inclined to prolong his stay in prison, so as to increase as much as possible his claim of damages. The defenders

Pleaded: The ordinary form of summons in Scotland is in certain respects extremely defective. Instead of authorising a detention of the person against whom the suit is intended, as is done in England, agreeably to the ancient law of Rome, the notice thereby given seems to be calculated for enabling the defender to elude the claims that are to be made against him. To remedy this, and to render the decreets of our courts effectual, it has been wisely settled, that a warrant may be obtained for imprisoning any person, being a native of this country, or having a fixed residence in it, unless he find caution to remain in Scotland till the claims to which he is liable shall be determined by a final sentence. This has now become part of our common law; and every judge who has authority to imprison, may issue the warrant necessary for the purpose.

The method of proceeding, however, in such a case, having been introduced by no positive regulation, has never yet been precisely defined. A variety of precautions indeed have been suggested by the writers on our law, for preventing the abuse of so salutary a remedy, such as specifying on oath the nature and extent of the debt; a previous examination of the defender himself before proceeding to actual imprisonment; and a limitation of the security to be found, to such actions as should be commenced within a certain period from the date of the application. But it would be extremely hard, where no *animus injuriandi* appears, to subject a creditor for omitting any of those precautions, to a claim of damages: And where no objection is made at the time to the regularity of the arrest, the just presumption is, that no wrong has been done.

With regard to the judge by whose authority a warrant of this sort has been issued, it does not appear that in this, more than in any other case, where his conduct has not been accurately pointed out by a particular enactment, he can be subjected in damages, if he has proceeded without fraud, reparation being only due by persons so situated, as has been justly observed, “ in the case of manifest and
“ palpable

“ palpable injustice against law ; but not in dubious cases, where rational men may be of different opinions, unless there be corruption by bribe or bias ; otherwise no one but a beggar or a fool would be a judge ;” Stair, b. 4. tit. 1. § 5.

Answered: An arrest of one’s person as *in meditatione fugæ*, being an extraordinary remedy, and liable to great abuse, ought ever to be gone about with the utmost caution. Being of the nature of a criminal process, it ought never to be applied for without a thorough conviction that the party is about to leave the kingdom. Nor ought it to be authorised without evidence, at least by the oath of the person requiring the warrant, that a debt of a certain amount exists, and that without the intervention of the judge it will be frustrated by the disappearance of the debtor. And as by the statute of 1701, one charged with any bailable crime must be set at liberty on his finding security to abide any prosecution that may be brought against him within six months ; it would be singular, if one accused merely of an intention to avoid the diligence of the law for a civil debt, were to be in a worse situation. In addition to all this, which arises from the nature of the proceeding itself, it has been properly suggested, that before the imprisonment, the party charged with an intention to fly ought to be examined by the judge, so as to give him every opportunity of preventing a measure which may be attended with the most fatal consequences to his credit and fortune ; Stair, b. 4. tit. 47. § 23. ; Bankt. b. 1. tit. 23. § 36. ; Erskine, b. 1. tit. 2. § 24.

If, therefore, without any reason for believing that his debtor is about to leave Scotland, a creditor shall have recourse to so harsh a measure, he ought to suffer the consequences of his improper conduct. And if by omitting any of the precautions which have been thought of for the due exercise of this extraordinary power, a man has been deprived of his liberty, even the character of a judge ought to afford no protection from the claim of reparation arising to the injured party. The distinction adopted in this matter in the Court of Exchequer seems to be a solid one. In the case of an illegal seizure of goods, neither the officer of the revenue, nor the judge who has interposed his authority, is in general liable in damages, if the proceedings do not evidently appear to have arisen from improper motives : But where the personal liberty of any one has been restrained without the order of law, a claim of indemnification ever necessarily follows. Indeed in such a case as this, where the judge was at liberty either to interpose or not, there is not any reason for admitting the same latitude as may be thought necessary in other cases, where, from the nature of the thing, he is obliged to adopt decisive measures.

Replied: As every sentence of a judge may, in Scotland, be enforced by imprisonment, no reasonable distinction can be made between the case of a party arrested in the ordinary way, in virtue of a decree erroneously pronounced, and that of one apprehended in consequence of a warrant such as was here issued. In both cases, the error committed

committed by the judge, and the injury resulting from it to the private party, are precisely of the same nature.

It was separately urged for the pursuer, that warrants of this sort could not be granted by a justice of the peace; but as the pursuer had been apprehended within the limits of the borough of Brechin, where Mr Mollison, one of the defenders, was provost, and as it did not clearly appear whether he had acted in the one character or in the other, little attention seems to have been paid to this circumstance.

The Judges were unanimous in finding James Watson the creditor liable in damages, as he had made the application without having any reason to believe that the pursuer meant to leave Scotland.

Somewhat more difficulty occurred with regard to Mr Mollison, who appeared to have acted *bona fide*, and without any intention to injure. In general the Court were of opinion, that although perhaps no one of the particulars mentioned would have been sufficient to subject him, his conduct on the whole had been so incautious as, in a proceeding of this sort, justly to create an obligation to make up the loss; which, however, on account of the pursuer's omitting to take the proper measures for obtaining his enlargement, the Court resolved to bring within as narrow limits as possible.

The Lords found "the defenders liable to the pursuer in damages and expences."

A petition was afterwards preferred for the heir of Mr Mollison, he having died, insisting that he should be assilzied; or at least, that he should be found liable *subsidiarie* only, after the pursuer had endeavoured to recover his damages from Watson, as the person chiefly guilty. The Lords appointed the petition to be answered on the last point. But after advising these papers the former judgement was affirmed.

Reporter, Lord Esgrove.
Clerk, Sinclair.

Aff. Dean of Faculty, W. Robertson.

Alt. Wright, Corbet.

C.

N^o C.

N^o C.

December 22. 1789.

EDINBURGH GLASSHOUSE COMPANY,

A G A I N S T

J O H N S H A W.

APPRENTICE.—PERSONAL AND TRANSMISSIBLE.—SOCIETY.—*The indentures of an apprentice to one trading company, not assignable to another, though carrying on the same trade, and though by the articles of partnership a continual and indiscriminate change of individual members be admitted.*

SHAW was bound as an apprentice to the late Alloa Glasshouse Company; by whose articles of copartnership, it was allowed to each partner to sell his share, and transfer his place in the company to any person whatever, so that no certain reliance could be had on the continuance of any individual member.

The indentures bore on the one hand, that Shaw, during the term of his service, which was seven years, should work “in the Glasshouse at Alloa, or at any other glasshouse he might be ordered to by the said company, or their manager for the time;” and on the other hand, that the company “should cause him to be instructed in the different branches of glass-making.”

Within two years after the date of the indentures, the company resolving to give up business, conveyed to a trustee, for the purpose of its being sold, the whole of their stock, in which they comprehended “the services of the workmen and apprentices engaged to their works.”

The effects were all purchased by the Edinburgh Glasshouse Company, in whose favour a disposition, specially mentioning the transfer of those services, was executed.

Shaw continued for several months to serve at the works under his new masters, but at length he withdrew from them, and engaged himself elsewhere. They still asserted their claim to his service; and the judge-ordinary having sustained that claim, granted warrant for his imprisonment, until he should find caution to return to the work that he had deserted. He then brought the question before the Court by suspension; and

The Lord Ordinary pronounced judgement as follows: “Finds,
“That if the original partners had severally sold or transferred their

“ shares to a new set of partners, the new company or set of partners
 “ would have been bound by the indentures, and intitled to the ser-
 “ vices thereby stipulated; finds no relevant or sufficient ground to
 “ distinguish the case in question from the case supposed, all the part-
 “ ners having in this case concurred in transferring their right of
 “ partnership, particularly the indentures, to a new company or set of
 “ partners; and also finds, that they were entitled so to do by the
 “ true intent and meaning, and express words of the indenture;
 “ therefore finds the letters orderly proceeded.”

In a reclaiming petition, Shaw

Pleaded: A *delectus personæ* is implied, whenever a free man engages his service. No master can assign over his servant or his workman, without their consent; nor are they required to justify their refusal by offering any reason for it. Could such an assignation be voluntarily made, the indenture of an apprentice might still more be adjudged for the debts of the master, might be arrested by his creditors, and might become the subject of competition in a multipointing; consequences too novel and alarming to liberty even to be mentioned. No apprentice's indenture ever passed to the master's heirs; on the contrary, an action of repetition of the apprentice-fee arises on his death, though indeed it may be eluded by an offer to fulfil the obligations of the master. Dict. of Decis. voce Apprentice; Fountainhall, 17th February 1711, Cutlar *contra* Littleton.

Nor in the case of an apprentice to a company is there any exclusion of the same *delectus*. Were a lease of lands granted to such a company, admitting a change of members, but exclusively of assignees, it would not give validity to a transference of the lease, that the assignees were not more different from the original company, than it would have become by the gradual change of members; or that these individual assignees might have thus come to constitute the whole of the company. It is true, the members of the company were necessarily subject to change while it subsisted; but the dissolution of a company is totally different from the change of members, the apprentice not being bound to the new company.

Answered: In general all rights are assignable, Stair, 3. 1. 15.; but there is an exception in the case of *delectus personæ*. In contracts for performance of work or service, these having no connection with the person of the creditor, are plainly nothing else but obligations *ad factum præstandum*, which are just as assignable as any other debt or right. If a person contract with a labourer to do any work on his estate, it seems clear, that such a contract could be effectually assigned to a purchaser of the estate. Ordinary cases of apprenticeship indeed imply a *delectus personæ*; but in the present instance there would have been absurdity in the idea, when applied to a company, the members of which were, by the constitution, changing from time to time; so that after any given period, though the apprentice was to continue as much bound as ever, it could not be said that any one individual, the

the supposed object of his *delectus*, would remain. Nor by the indentures was he to expect any particular manager of the works to instruct him, as that officer was equally liable to be changed. The only *delectus* that the circumstances admitted of, was that of place; but this is excluded in express terms.

The Court at first adhered to the Lord Ordinary's interlocutor; but afterwards the idea prevailed, that indentures of apprentices were in their nature so far from being a subject of commerce, that the speciality of this case could not justify the transference. And by a final judgement,

The Lords "altered that interlocutor, and suspended the letters *simpliciter*."

Lord Ordinary, *Gardenston*.
G. Fergusson.

For Edinburgh Glasshouse Company, Lord Advocate,
Alt. Dean of Faculty, M. Ross.

Clerk, Home.

S.

N^o CI.

January 20. 1790.

ROBERT BRUCE-HENDERSON,

A G A I N S T

Sir JOHN HENDERSON.

FIAR.—*A husband understood to be fiar of a subject provided to him nomine dotis, though the wife's heirs be called next after those of the marriage, the wife herself being named as a substitute.*

TAILZIE.—IRRITANCY.—FIAR ABSOLUTE AND LIMITED.—*A condition in an entail, that the heirs should denude in the event of their succeeding to a particular estate, applied, in a question with the next heir, to the case of an heir already proprietor of that estate, when the tailzied succession opened to him; and effectual, though not fenced with prohibitory, irritant, and resolute clauses.*

CHARGE TO ENTER HEIR.—*Special charge includes a general one ejusdem generis.*

ROBERT BRUCE of Earlshall settled his estate "on the heirs-male of his body; failing these, on his four daughters successively; and they and their heirs failing, on his sisters."

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The succession under this destination opened to Helen Bruce, the eldest daughter.

She was afterwards married to James Henderson. To him, by the marriage-contract, she became bound to pay a sum of money equal to the value of the estate; and probably from some doubt of the feudal right in her father, or of his powers to make the settlement, she prevailed on her sisters to concur with her in granting a trust-bond for a sum exceeding the value of the estate, for the sole purpose "of establishing a title by adjudication to the lands of Earlsball, and then denuding thereof in favour of James Henderson and Helen Bruce in conjunct fee and liferent, and the heirs of his body to be procreated betwixt him and the said Helen Bruce; which failing, to and in favour of the said Helen Bruce, and the heirs of her body by any subsequent marriage; and (after substituting her sisters and their heirs) of James Henderson, his heirs and assignees whomsoever."

An adjudication was accordingly led by the trustee, he having charged Helen Bruce and her sisters to enter heirs in special to their predecessors.

In order to denude himself, the trustee executed a conveyance, stating, That the bond had been granted to him for behoof of James Henderson, and that it was just he should convey to him the right created by the adjudication, the dispositive clause being as follows: "Therefore wit ye me to have disponed, &c. to the said James Henderson, and Helen Bruce his spouse, and longest liver of them two, in conjunct fee and liferent, and failing either of them by decease, to the heirs and assignees of the survivor, all and whole the lands," &c.

A charter of adjudication and resignation of the estate was afterwards expedite in these terms: *Dilecto nostro Jacobo Henderson de Earlsball, ejusque hæredibus et assignatis quibuscunque.*

After taking infestment, Mr Henderson executed an entail "in favour of himself and Helen Bruce in conjunct fee and liferent, and (after various substitutions) in favour of Sir Robert Henderson of Fordel, and the heirs of his body;" to which destination the following clause was subjoined: "In case any of the heirs of tailzie shall happen to succeed to, and be in possession of the estate of Fordel, then the said heir shall be obliged to make up titles to the lands of Earlsball, and to convey the same to his second son, &c. whereby the two estates may be enjoyed by two separate and distinct persons, and the said lands of Earlsball not be absorbed in the estate of Fordel."

Helen Bruce survived her husband, and continued to possess the lands till her death; when Sir Robert Henderson served himself heir of tailzie and provision under this deed.

Upon his death, his eldest son Sir John Henderson entered into possession of the estates both of Fordel and of Earlsball. He afterwards obtained a conveyance to the latter estate from the heirs of line of

of Helen Bruce, which was intended to form a right independent of that of James Henderson.

In virtue of the above-recited clause of devolution, Robert Bruce-Henderson, the second son of Sir Robert, instituted an action against his brother, in order that he might be decerned to make up titles, and then to denude himself of them, according to the injunction of that clause. It was

Pleaded for the defender, in the *first* place: The entail in question proceeded *a non domino*, and the defender's right is independent of the entail.

By the conception of the trust-bond, the fee was not placed in James Henderson, but in Helen Bruce. In ordinary cases, the maxim of law no doubt is, that where a right is taken to husband and wife in conjunct fee and liferent, and the heirs of their bodies, or their heirs indefinitely, the husband is deemed, from the prerogative of his sex, the sole fiar, as the *persona dignior*, and the right of the wife resolves into a liferent; for which reason the words *their heirs* are interpreted to be the heirs of the husband. But to this rule there are exceptions; and in particular, as (in conformity to Lord Stair, p. 502.) it is expressed by Lord Bankton, "the person to the heirs of whose body the destination is made, failing heirs of the marriage, is presumed fiar, though failing those, the last termination should be upon the heirs of the other; for the rule is, that the person is fiar *cujus hæredibus maxime providetur*, vol. 2. p. 337." The same doctrine is laid down by Mr Erskine. Now this was the predicament in which, by the trust-bond, Helen Bruce stood.

On the other hand, the destination in the reconveyance was "to the longest liver, and to the heirs and assignees of such survivor;" and Helen Bruce was the survivor. In her, therefore, the right of the adjudication was ultimately vested, agreeably to the decision 22d November 1749, Lord Boyd *contra* King's Advocate, Kames's Rem. Decis.

Besides, as the estate of Earlshall stood devised to heirs-male, and Helen Bruce could only take the estate as heiress of provision under her father's settlement, it was inept to charge her and her sisters to enter heirs in special to their predecessors, as if all of them had been heirs-portioners to the estate, and the investitures of it had stood in favour of heirs whatsoever.

Answered: With regard to the terms of the trust-bond, there are two grounds, independently of *the last termination being upon* the heirs and assignees of the husband, on which the fee became vested in James Henderson. One is, that the first substitution is to *the heirs of his body*, so that had there been children of the marriage, they must have taken up the fee by a service as heirs of provision, not to Helen Bruce, but to James Henderson. The other ground is, that Helen Bruce herself, and not her heirs, is called in the substitution next after the heirs of the marriage; and consequently she is to be considered merely as a substitute, and as having only an eventual right

of fee, in case her husband should die without children existing of the marriage; and such eventual fee could have been taken up by her, in the character only of heir to her husband or children respectively. The character of institute then being solely applicable to the husband, a decisive answer arises from this circumstance to the arguments founded on the authorities quoted on the other side.

The terms of the reconveyance, so different from those of the trust-bond, would have required some other authority than the will of the trustee; but even these are not inconsistent with the fee being understood to have been in James Henderson. In conjunct fees, to make the wife *fiar* two requisites must concur; first, that the last termination be upon her heirs, which here it was not; and, secondly, that the subjects flowed from her or her friends *gratuitously*; whereas here the grant of the estate was not gratuitous, but in implement of the obligation in the marriage-contract, which *nomine dotis* provided the wife's interest in the estate, or what was equivalent to it, in Mr Henderson's favour.

At the same time it is to be observed, that this question is superseded by the consideration, that the fee was certainly in Mr Henderson during his lifetime. The estate could then have been adjudged by his creditors, and consequently was equally disposable by his deed, as in this case.

With respect to the objection made to the charge on which the adjudication proceeded; as a special service implies a general one *ejusdem generis*, so a special charge which is the substitute of a service, is held to include that kind of charge called a general special charge, and consequently the special charge in question was competent to carry the personal right, which Helen Bruce might have taken up by general service. Nor, however superfluous, could it invalidate this proceeding, to include unnecessarily her sisters.

Pleaded for the defender, in the *second* place: The entail being supposed not *ultra vires* of the granter, the clause of devolution, when strictly interpreted as it ought, will not aid the pursuer, as having no application to the actual circumstances of the case. The condition of this devolution is, "That the heir of entail shall happen to succeed to, and be in possession of the estate of Fordel;" but the case which happened, was that of a proprietor of Fordel succeeding as heir of tailzie to Earlsball. This latter situation cannot be included under the entail, except by implication, which would be an extension of its terms beyond their natural and proper import.

But this would be inconsistent with that strict interpretation of entails which is established by the concurring voice of all the writers on our law, whether ancient or modern. Stair, p. 614.; Erskine, p. 556.; also Craig, p. 340.; Hope, p. 400.; Bankton, vol. 1. p. 588.

Besides, this devolving clause is unconnected with the prohibitory, irritant, and resolute clauses applied to the rest of the deed, and contains nothing but a bare injunction to convey.

Answered: Those authorities all refer to restraints upon such uses of property as are not only adverse to the nature of the right, but to
general

general expediency. The public interest requires, that their operation should be as much limited as justice will permit; and if the terms in which they are conceived be not express and significant, the law will not interpose to supply what is wanting, or to infer what is withheld.

But if, on the other hand, the question is merely which of two heirs shall succeed, a matter which concerns not the general interest, the testator's will is to be judged of according to the same rules that are employed in the interpretation of any other deed or contract, upon a complex view of the whole, and consideration of the object in view. Thus it was James Henderson's object to prevent "the estate of Earlsball from being absorbed in that of Fordel;" an event not more connected with the case in express terms described, than with that which in fact has occurred. A similar judgement was given in the case of Balnagowan, 26th November 1755.

The Lord Ordinary reported the cause, when

The Court seemed to adopt most of the arguments of the pursuer, and

"Repelled the defences, and decerned and declared in terms of the libel, with respect to the pursuer's right to the lands and estate libelled, and the defender's making up legal titles thereto, and denuding thereof in favour of the pursuer, in terms of the entail libelled."

And the Court adhered to that judgement, on advising a reclaiming petition for the defender, with answers for the pursuer.

Reporter, *Lord Rockville.*

A. R. *Rolland.*

Alt. *Party.*

Clerk, *Mitchelson.*

S.

Nº CII.

N^o CII.

January 20. 1790.

Sir WILLIAM DUNBAR, Baronet,

A G A I N S T

JOHN DAVIDSON.

MEMBER OF PARLIAMENT.—*Refusal to take the oath of trust, implied.*

AT the Michaelmas meeting of the freeholders in the county of Caithness in the year 1789, John Davidson, being then on the roll of freeholders, gave his vote in the election of preses and clerk.

After this a good deal of altercation ensued; but no business was done, until one of the freeholders tendered the oath introduced by 7th Geo. 2. to several of the voters, and among others to Mr Davidson; but by this time Mr Davidson had left the meeting.

The freeholders having refused to expunge Mr Davidson's name from the roll, Sir William Dunbar preferred a petition and complaint to the Court of Session. In defence, Mr Davidson

Pleaded: The right of voting as a freeholder being the creature of positive statute, the proceedings with regard to it must be precisely regulated by the different enactments which have been made in that behalf. Thus it has been found, that the oath introduced by the 7th of the late King, could not be put before the election of preses and clerk, although in this way the fate of the return may be determined by those who have no right to vote. In the same manner, the mere *absence* of a freeholder when this oath is tendered, cannot deprive him of his right of voting. For this purpose, it is necessary that he should *refuse* to take the oath, a circumstance which cannot with truth be here alledged. February 1773, Archibald Duff *contra* Sir Ludovick Grant.

Answered: There is a great difference between extending a regulation merely statutory, to a case which the words of it cannot, with any propriety, reach, and controuling those devices which are calculated, without offending against the *letter* of the law, to elude its true *meaning*. In the one case, the powers of legislation are necessary for remedying an imperfection, which the act of the legislature itself has occasioned. In the other, those to whom the execution of the law has been intrusted, only give a proper effect to the enactment

enactment as it has been made. Though, therefore, it has been decided, that the trust-oath could only be tendered when the freeholders were employed in voting for a member of parliament, or in adjusting their roll, these being the only two cases provided for by the statute; yet in a question, whether a freeholder has refused to take the oath when duly tendered, the Judges must be authorized to pronounce a decision agreeable to the circumstances of the case as they really happened. If it should be determined by the freeholders, that the oath when duly tendered should not be put, this would be deemed equivalent to a refusal, if the freeholder to whom the oath was tendered did not declare his readiness to swear. And the absence of a freeholder at a period so critical, after he had voted in the election of preses and clerk, and when he could not be ignorant of an intention to put the oath, must be viewed in the same light. Without this, it would be in the power of a person, once admitted to the roll of freeholders, to give his vote in the election of preses and clerk as long as he lived, however exceptionable his freehold-qualification might be. 9th December 1780, Fergusson *contra* Campbell; 7th July 1784, Brodie *contra* Urquhart.

All the Judges seemed to think, that if any freeholder had declared his purpose of putting the oath before Mr Davidson left the meeting, his absence afterwards would be construed into a refusal to swear, unless he could give a sufficient reason for his quitting the meeting. And a majority being of opinion that Mr Davidson's conduct was not less ambiguous,

After advising the petition and complaint, which was followed with answers,

The Lords found, " That the freeholders did wrong in not expunging the name of Mr Davidson from the roll," &c.

A reclaiming petition was afterwards preferred for Mr Davidson, and refused.

Aff. Wemyss, et alii.

Alt. George Fergusson, et alii.

Clerk, Home.

C.

N^o CIII.

January 26. 1790.

Mrs ELISABETH ROSE,

A G A I N S T

Mrs ANNE FRASER.

INFESTMENT.—TERCE.—*A widow's claim to her terce sustained, when the husband's infestment had been reduced on nullities.*

MR ROSE of Kilravock made up titles to that estate by service as *heir-male* to his father; while the superiority of it stood devised to *heirs whatsoever*, and the property had been separately conveyed by his father, with infestment, to a confidential friend, in order to the creating of freehold-qualifications; the destination on the failure of that friend being in like manner to the granter's *heirs whatsoever*. A reconveyance was afterwards executed in favour of Mr Rose, but not followed by seisin.

His service was on these grounds set aside as inept, by an action of reduction brought after his death at the instance of the heir of line*.

In these circumstances his widow having been *served* to her terce, the heiress of line brought the proceeding under challenge in an action, in which she contended, that since Mr Rose's infestment had been found to be inept and void, his widow had no better claim to a terce, than if he had never been at all infest.

Pleaded for the defender: It is unquestionable, that Mr Rose made up such titles as were understood to be sufficient for vesting him in the estate, that during his lifetime these were never impeached, and were relied on by all, especially by the defender his wife. Justice therefore requires, that any latent imperfection in them not made known till after his death, should not be permitted to disappoint her of her right of terce.

No fraud or wilful neglect on the part of a husband in regard to his infestment, has any effect in depriving a widow of that right. Craig, lib. 2. dieg. 22. § 25.; Stair, b. 2. tit. 6 § 16.; Fountainhall, 1st December 1711, Forbes; 15th February 1712, Marquis of Annandale *contra* Scott; Balfour, Lord Blair *contra* Hamilton; Spottiswoode, Terce. As little ought the mere error of a husband,

* Fac. Coll. 10th March 1784.

as in the present case, to have such an operation contrary to his intention. Even were he afterwards inclined, as in the event of a divorce obtained by the wife, the law would not permit him to found a plea on his own error, in bar of that legal provision; nor would his representatives be more privileged than himself. In the present case, where the error was unknown, and such a purpose unthought of, the husband's representative is, if possible, more forcibly precluded from that plea.

The case of the courtesy is perfectly analogous to the terce, of which it is the counter part; and with regard to this it was found, "That an heiress's infestment not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, that had it been quarrelled during her life, these nullities might and would have been supplied." Hamilton *contra* Boswell, 15th June 1716, Dict. *voce* Courtesy.

The claim of terce then is well founded, though there existed no effectual infestment in favour of the defunct. But there was in fact such a valid infestment in the property, with which alone the claimant is concerned, inasmuch as the trustee was regularly infest, by which the true and substantial right became vested in Mr Rose, that of the former being purely nominal; indeed by the reconveyance, the trustee's right was discharged in his favour. As the widow of the trustee, therefore, could have had no title to the terce, a point decided 10th February 1756, Cumming *contra* his Majesty's Advocate, so this right belongs of consequence to the defender.

Answered: At the death of Mr Rose, the estate remained *in hereditate jacente* of his predecessors, his infestment being inept and invalid. From that estate then, the terce, which is exigible only out of subjects in which the husband was vested by feisin, cannot legally be demanded.

The authorities quoted by the defender relative to the claim of terce, tend only to establish, that a personal or declaratory action lies against the representatives of a husband who has fraudulently omitted to take infestment, but not that the wife's service in such circumstances is valid, though the validity of such a service is alone in question; while here, there is no pretence of fraud.

The decision in the case of courtesy, so briefly stated in the Dictionary, fails in its application. For here the infestment that was reduced respected only the superiority, which is not subject to the claim of terce, and conferred no real right in the subordinate fee of the property with which the trustee was vested.

With regard to the supposition that Mr Rose held the substantial right of fee, through the person of the trustee; it arises from overlooking the distinction, that the trust proceeded not from Mr Rose, but from his father. Though this might be said of the latter, it could not of the former, who had neither appointed the trustee, nor become vested in the subject of the trust; for the personal reconveyance, not completed by infestment, could not have that effect. The decision therefore in the case of Cumming *contra* King's Advocate, does not

not apply; for though no terce be due to a trustee's widow, it will not follow, that the widow of a person from whom the trust did not proceed would be intitled to it.

The Lord Ordinary reported the cause.

The Court were of opinion, that as the husband himself could not in any event have founded an objection to his wife's legal claim, upon the erroneoufness of his titles, his representative the pursuer was equally precluded from urging that plea. It seemed likewise to be in general understood, that the reconveyance, though not completed by feisin, was sufficient to transfer to Mr Rose the substantial right held by his father, in contradistinction to the nominal title of his trustee.

The Lords therefore repelled the reasons of reduction.

Reporter, Lord Stouffield.
Clerk, Menzies.

Adv. Wight, et alii.

Adv. Lord Advocate, Honyman.

S.

N^o CIV.

January 26. 1790.

Mrs ELISABETH ROSE,

AGAINST

Mrs ANNE FRASER.

INFESTMENT.—TERCE—*Due out of lands situated within the royalty of a borough, and contained in the charter of erection, if held not in burgage, but in feu, of the town.*

MR ROSE of Kilravock died infest in certain subjects situated within the royalty of the borough of Nairne, and comprehended in its charter of erection, but which were held of the magistrates in feu.

His widow having been served to her terce of these subjects, the service was challenged in an action of reduction at the instance of his heir, who

Pleaded :

Pleaded: It is incontrovertible, that no terce is due out of burgage-tenements, Craig, lib. 2. dieg. 22. § 34.; or, as it is expressed by Lord Stair, "tenements within burgh, or holden burgage." Nor is there room for distinguishing between tenements *within burgh*, tho', like those in question, held of the town in feu, and those *holden burgage*, as if the terce were more exigible out of the former than out of the latter. Brieves of terce are not competent before bailies of royal burghs; but if the terce had been understood to be due from such feus, this could hardly have been the case. Not a single instance has been pointed out of any terce in such circumstances.

Answered: The exemption of burgage-tenements from terce, if a part of our law, is one for which no good reason has been assigned. In the case of a burgh of barony, or of regality, it was disregarded by the Court, Park *contra* Gibb, 15th November 1769, Dict. vol. 3. *voce* Terce.

But at any rate, the exemption is to be strictly confined to burgage-tenements, such as are held by burgage tenure; whereas the defunct was infest under a feu-holding. That rule is laid down by Sir Thomas Hope, Min. Pract. tit. 9. § 16. and by Mr Erskine, b. 2. tit. 4. § 9.

The Court were unanimously of opinion, That the rule excluding burgage-tenements from the claim of terce, was applicable only to those held by burgage-tenure, and

The Lords repelled the reasons of reduction.

Reporter, Lord Stonefield,
Menzies.

Act. Wight, et alii.

Alt. Lord Advocate, et alii.

Clerk,

S.

N^o CV.

January 27. 1790.

PRIMROSE YOUNG,

AGAINST

CHARLES CAMPBELL.

HUSBAND AND WIFE.—HERITABLE AND MOVEABLE.—*The debts of a trading company, although constituted by bonds bearing interest, or secured on land, considered as moveable, in a question between the widow and representatives of a deceased partner.*

After the company of Douglas, Heron, and Company, bankers in Ayr, which stopped payment in 1772, had been declared to be dissolved, unless for the purpose of winding up the concerns, the sum of L. 500,000 was, by some of the solvent partners, raised by the sale of life-annuities, for discharging the debts of the Company.

As this method of procuring money soon appeared to be a very disadvantageous one, an act of the legislature was obtained in 1774, authorising the redemption of the annuities. The money necessary for this purpose was to be raised on personal bonds, bearing interest, and collaterally secured by infestment on the land-estates of those partners who had applied to parliament. These bonds were declared by the statute to be transmissible by indorstation, and devisable by will.

Primrose Young was the widow of one of the partners of the Company, who had died in possession of considerable funds falling under the *jus relictae*. But if the debt arising from the bonds already mentioned, corresponding to his interest in the Company, was to be considered as a burden on his moveable estate, her right would thus be rendered of very little value. In mutual actions brought by her and Charles Campbell, the general representative of her husband, for trying this question, She

Pleaded : In regulating the interests of the widow and kindred of a person deceased, it is an established rule, that bonds bearing interest, and still more those secured on land, as they do not fall within the *jus relictae* when due to the husband, shall not diminish her share when exigible from him. Thus it appears, that the sums here due to the creditors of the Company in which the deceased had been engaged, must be a burden on the representatives of the deceased only.

It

It is true, that this debt originally arose from an agreement, the consequences of which, as long as it subsisted, would have affected the widow's right. This, however, is of no importance. In questions of this kind, it is the situation of things at the death of the husband which is the governing rule. If the partners of this Company, instead of being losers, had made great profits, which, after the dissolution of the copartnership they had employed in purchasing land, or bonds bearing interest, those acquisitions would have belonged, not to the widows, but to the representatives of the several partners: a circumstance which clearly shows the propriety of throwing the burden of these transactions, as matters now stand, on the latter, and not on the former.

In the case of money borrowed jointly, by several co-obligants in an heritable bond, although before the loan the money may have been so situated as to descend to executors, and although the debt which it was intended to discharge may have been of the same nature, the claim of the creditor for the whole sums due, as well as that of the several co-obligants, to recover from one another what they may have paid beyond their proportion of the debt, is heritable as to all, and must affect the interest of those claiming their succession in the same manner. The present case must be viewed in the same light; for although the bonds were subscribed only by a few of the members of the dissolved partnership, they must be considered as the deed of the whole, so as to place every one of them on the same footing.

Answered: The right which a partner in a mercantile company has in the property belonging to it, is of a moveable nature, whatever the situation of the effects acquired by it may be. While the company subsists, each partner can only demand his share of those profits which have arisen out of the adventure; and when the company is dissolved, his only claim is for his proportion of the common stock, after payment of the debts affecting it. In both cases, the nature of his right, as well as that of those who, after his death, claim an interest in his effects, must be regulated by the nature of the agreement out of which it arises.

There are few mercantile companies, the stock of which does not in part consist of landed property; and in many of them, it is almost entirely composed of money lent out at interest, or secured on land, as was the case of the public banks in Scotland, before the business of negotiating bills of exchange was brought to its present height. It is, however, a settled point, that the shares in these companies, though incorporated by statute, and having a perpetual succession, descend to executors, as indeed was very solemnly determined, Dict. *voce* Heir and Executor, 1st July 1735, Sir John Dalrymple *contra* the Representatives of Dame Jean Halkett.

In the case of a bond subscribed by many co-obligants, and containing an obligation to pay interest, or accompanied with heritable security, it arises from the nature of the transaction, that the representatives of each *correns* should be obliged to make payment, in the
same

same manner as if every one of them had, in a separate writing, come under the same engagement. And in the case of landed property, or even bonds bearing interest, acquired by the members of a company which is finally dissolved, the succession of the *quondam* partners would doubtless be regulated in the same way as if no co-partnery had ever existed. But in the present instance the company, though it has given up trade, must still subsist for the purpose of paying its debts. And as the profit arising from the adventure would have been considered to be of a moveable nature, so as to enlarge the widow's share, justice requires, that a proportion of the loss, if there is any, should also fall on her.

The Lords found, "That the claim arising against the deceased as
" a member of the partnership of Douglas, Heron, and Company,
" was of the nature of a moveable debt, affecting the goods in com-
" munion between husband and wife; and decerned."

Reporter, *Lord Dregburn.*
Clerk, *Sinclair.*

For the Widow, *Blair.*

For Charles Campbell, *Wight.*

C.

N^o CVI.

January 27. 1790.

PRIMROSE YOUNG,

AGAINST

CHARLES CAMPBELL.

*ALIMENT—Found due to a widow by the representatives of her husband,
her legal provisions being insufficient.*

THE husband of Primrose Young died in possession of effects both heritable and moveable. But in consequence of his engagements as a partner of Douglas, Heron, and Company, which were found to be a burden on his moveable estate *, she could derive little or no

* See the preceding case.

benefit

benefit from her *jus relictae*, while the subjects liable to her claim of terce were too inconsiderable to afford her a sufficient maintenance.

She therefore instituted an action against Charles Campbell, the nephew and general representative of her husband, for a suitable aliment out of her husband's whole effects. See 6th March 1776, Macculloch; 15th December 1786, Maclean.

It was considered as a fixed point, that an aliment was due, nor indeed was this disputed by the defender.

The Lords found the pursuer intitled to an aliment; which, by a subsequent interlocutor of date 10th March 1790, they fixed at L. 50, this being considered as equal to a fourth of the free produce of the effects belonging to the deceased, both heritable and moveable.

Reporter, Lord Dreghorn.

Adv. M. Ross.

Adv. Macnechie.

Clerk, Sinclair.

C.

N^o CVII.

February 2. 1790.

Sir WILLIAM DUNBAR, and others,

A G A I N S T

Sir JAMES SINCLAIR.

JURISDICTION.—MEMBER OF PARLIAMENT.—*Competent to try a party's right to a peerage, when stated as an objection to his continuance on the roll of freeholders.*

SIR WILLIAM DUNBAR and other freeholders of the county of Caithness, made this objection against Sir James Sinclair's remaining on their roll, That though he had not assumed the honours of the Earldom of Caithness, he had acquired by succession the right of that peerage.

The objection having been repelled by the court of freeholders, a

petition and complaint against that judgement was preferred, and followed with answers; after which a hearing in presence took place, the chief subject of debate being, whether it was competent for the complainers to produce evidence of their allegation. In support of the affirmative, they

Pleaded: The Court, by various statutes, has power, and is required, to take cognizance of all questions respecting inrolment of freeholders, in which are comprehended such as relate to the disqualification arising from the state of a peer. By the statute of 1661, cap. 35. *noblemen* are expressly prohibited from acting as freeholders.

A peerage is *jus sanguinis*, which inheres in the person, and cannot be abandoned. It was so determined in Lord Ruthen's case in 1640, and in that of the Viscount of Purbeck in 1678. Peerage is no doubt a *privilege*; but it is likewise in the nature of an indispensable *office*.

The right to a peerage then, as soon as it has devolved, though not yet assumed by the party, creating a bar to inrolment, that point comes necessarily under the cognizance of the Court. Without such incidental cognizance, the jurisdiction conferred and enjoined by the statutes would be frustrated.

It is not extraordinary that matters should be indirectly judged of in courts which, with regard to them, have no original jurisdiction. The English statute of 7th and 8th William III. has enacted double damages as a penalty on officers making a false return of the election of a member of parliament, action for such damages "being brought within *two years*." As the matter, however, might not be tried in the House of Commons during those two years, it has been found, that the merits of an election could to that effect be judged of by the courts of law. *Wynne versus Middleton*, anno 1745; *Wilfen's Reports*, 1. 125. In the same manner, a Committee of the House of Commons lately, in Mr Douglas's case, heard evidence of his right to the peerage of Angus.

In such cases, the maxim of law is, that *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit*, l. 2. ff. de Jurisdic. ; and it is obvious, that jurisdiction could not be explicated, were the cognizance of Judges not to extend to questions incidental to the matters at issue, though these would not have fallen under their original judicature. For example, suppose an estate conveyed, or a legacy bequeathed to a party, under the condition *si Titia nupserit*, or *non nupserit*: Or suppose in the Court of Justiciary the invalidity of a marriage were pleaded against the charge of bigamy; it is evident, that the question of legal marriage, though proper to the consistorial court, would then be judged of as relative to the point at issue. In the same way, Sheriffs are competent to the incidental trial of forgery, and the Commissary-court to the cognizance of *idiotry*, *Ersk. b. 1. tit. 2. § 8.*; *Kames's History of Courts*; *Kilker. voce Idiotry*. And it is also manifest, that even courts of freeholders cannot judge

judge of the claims for inrolment made by persons in the characters of apparent heirs, or of husbands, without determining concerning the legality of marriage.

Nor is there any reason why this collateral cognizance should not comprehend rights of peerage as much as any other matters. If a bond be granted, or a legacy bequeathed, payable when the debtor or the heir shall succeed to a peerage; or, in the frequent case of entails, as those of the estates of Cumbernauld and of Panmure, where succession to a peerage is made to infer a forfeiture, it is plain that justice could not be administered were this very point not discussed.

A remarkable instance of a court of law giving judgement in regard to the right of peerage occurred in England in the case of the Earl of Banbury, who being brought to trial for murder before the Court of King's-Bench, pleaded the privilege of a peer, which that Court, after cognizance of his right, sustained, though in opposition to a judgement of the House of Lords. Skinner, 517; Salkeld, 509.

Answered: It is admitted, that even the lowest court in the kingdom may try incidentally the fact of possession of peerage, when this is notorious and incontestible. But the formal cognizance of the state of a peer, is peculiar to the House of Lords acting in virtue of a reference by the King.

Accordingly, were a person in the acknowledged possession of the rights of peerage, to claim nevertheless, on the ground of some alleged defect in his patent, or failure in descent, the incompatible privilege of inrolment as a freeholder, it seems certain that the court could not enter into such an investigation. It is evident that the same rule which would govern in that instance, must likewise regulate the present, the two cases being convertible; and that rule is founded on the circumstance of notoriety.

Thus, since in certain cases peers are exempted from making oath, nor can they, or even their widows, be apprehended under caption or second diligence, every individual on any occasion may lay claim to such privileges; or on the same ground he may refuse to serve as a jurymen, or to submit to trial as a commoner; but if his claims be not founded on notorious possession, it is obvious they will not be permitted to interrupt the course of justice: Of which an instance lately occurred in the case of Sir Walter Montgomery, who having brought a suspension of a bill of caption, on the footing of his claim to the honours of Lord Lyle, which he offered to support by a long detail of pedigree, the Court refused to enter into the investigation, and repelled his plea.

The same circumstance, of notorious right, seems to have been the ground of judgement in Lord Banbury's case.

It has been supposed, that the Court would not hesitate to try the right of peerage, though only in remote pretence, as a condition of forfeiture under an entail. But that case involving a patrimonial interest,

terest, ought at any rate to be distinguished from the present, which respects only the franchise of a freeholder.

In consequence of this distinction, it has been often found, that it is *jus tertii* to freeholders to state or entertain the objections, that the deeds laid before them for enrolment were contrary to the prohibitions of an entail, or that by those conveyances superiors were unlawfully multiplied over the vassal.

Replied : With regard to the distinction between such rights of peerage as are obvious or incontestible, and those *in remote pretence*, it is truly no other than that of an easier, as opposed to a more difficult investigation ; a criterion that was never recognised.

It is true indeed, that the course of justice ought not to be impeded by a person, not in possession of the state of a peer, claiming in that character an exemption from juries, captions, or the like, when it is his own fault that his *status* remains doubtful. But from this it will not follow, that one who has succeeded to a peerage, should be permitted to avail himself of that very fault, in order to continue the exercise of a right to which he could otherwise have no claim.

The instances given of irritancy in entails, or of the unlawfulness of multiplying superiors, to which may be added the plea of death-bed, and the power of revoking donations *inter virum et uxorem*, all respect cases where the sole title of challenge being personal to an individual, his acquiescence renders the right complete and unexceptionable. While the party interested abstained from the objection, it was no wonder that it was held to be *jus tertii* as to freeholders.

“ The Lords allowed the complainers to prove, That Sir James Sinclair of Mey, the person complained upon, has succeeded to the title of the Earl of Caithness.”

A petition reclaiming against this judgement was presented, to which answers, by appointment, were given in ; but the question was not again brought to a decision.

For the Complainer, *Tait, et alii.*

Alt. Dean of Faculty, & G. Fergusson.

Clerk, Home.

S.

N^o CVIII.

February 4. 1790.

COLL MACDONALD,

A G A I N S T

The Common Agent in the Sale of KINLOCH.

PROCESS.—*Effect of a decret in absence obtained in the Court of Session, not preceded by a personal citation of the defender.*

IN the year 1764, the predecessor of Coll Macdonald instituted an action in the Court of Session against the late Mr Bruce of Kinloch, for payment of money alledged to be due as the price of certain articles furnished to the defender much more than three years before.

The execution of the summons in this action bore, "That the messenger had left a copy of the citation in the key-hole of the door of the defender's dwelling-house, because he could not get access, the door being locked;" and a decret in absence was regularly obtained and extracted.

Mr Bruce, the defender, died in 1784. By this time his affairs had gone into disorder; a process of sale of his estate, and for ranking his creditors, had been brought, when the decret already mentioned was produced: but the Lord Ordinary not considering it as a sufficient voucher of debt, refused to give it a place in the ranking. Coll Macdonald reclaimed, and

Pleaded: The statutes of 1672 and 1693, introducing the modern form of summons in the Court of Session, have communicated to it the full effect of both the first and second summonses formerly in use; and as the last of these contained a special reference to oath, a decret in absence obtained in that Court cannot, after the death of the defender, be set aside for want of evidence. It is true, that the decisions hitherto pronounced have related to cases where the defender had been personally cited. But this circumstance does not seem to be of any importance. A citation at the dwelling-house, or even an edictal one at the market-cross of Edinburgh, and pier and shore of Leith, has been, by special enactment, declared to be equally formal with one executed against the defender in person; and thus it must be held *præsumptione juris et de jure*, in all cases where the statutory solemnities have been observed, that the defender has been sufficiently put on his

guard. Indeed, as it was not formerly necessary to execute the second summons against the defender in person, provided the citation was given by a messenger at arms; to require this now to be done, would be to introduce an additional formality, where the legislature meant an abridgement of those formerly practised, Act 1540, c. 75.; 23d July 1789, Blair *contra* the Common Agent in the sale of Kinloch.

At the time when this reclaiming petition was under consideration, it appeared from the sale of the estate of Kinloch, that after paying the whole debts, including the one here claimed, there would be a reversion to the representatives of Mr Bruce.

The Court however were of opinion, that the judgement of the Lord Ordinary was well founded. A decret of the Court of Session, pronounced in the absence of the defender, if preceded by a personal citation, it was observed, had been long considered as unchallengeable after his death, and adopting of a different rule might give occasion to much embarrassment and injustice. But where the defender had not been personally cited, and where it was at least a possible case that he was equally ignorant of the decret as of the summons on which it was founded, it would be hard, and in many cases extremely unjust, to hold the proceedings as legal evidence of a claim otherwise unvouched.

The Lords refused the petition without answers.

Ordinary, Lord Ankersville.

Adv. Smyth.

Clerk, Menzies.

C.

N° CIX.

N^o CIX.

February 4. 1790.

The TRUSTEES of DONALD SUTHERLAND,

A G A I N S T

The Honourable Mrs CLEMENTINA LOCKHART, and others.

PROCESS.—*Effect of a decret in absence obtained in an inferior Court, where the defender has not been personally cited.*

THE deceased Donald Sutherland sued George Sinclair in the Sheriff-court of Caithness, for payment of money said to be due by an open account, which had lain over for more than three years.

In this action Mr Sinclair the defender was not personally cited; and the decret which followed, was pronounced without any appearance on his part. But in the course of certain proceedings which were afterwards held in the Court of Session, where he had an opportunity of objecting to the claim founded on this decret, and where he offered several objections to other claims which were made against him, no notice was taken of the way in which this decret had been obtained.

After the death, however, of Mr Sinclair, an objection was stated by Mrs Clementina Lockhart and others, who had succeeded to him, and who contended, that a decret such as this, obtained in absence, without citing the defender personally, and upon a claim which, in consequence of the statute of 1579, could only be verified *by the oath or writing of the party*, could be of no avail.

The difference between this case and those lately reported *, was, that the decret had been pronounced in an inferior court, to which the enactments in 1672 and 1693 did not apply. The general argument being much the same in all of them, it must be unnecessary to repeat it. The rules established with regard to decreets in absence seemed to be these :

1. That a decret in absence proceeding on a personal citation, could not, after the death of the defender, be challenged for want of evidence.

2. That where a decret in absence had been preceded by no personal citation, unless the pursuer had, by the authority of the judge,

* See the preceding Case. See also 23d July 1789, Blair.

intimated

intimated to the defender his resolution of making a reference to oath, it was competent, not only to the creditors, but also to the representatives of the defender, to bring it under challenge at any time, and that it would be necessary for the pursuer to support the decret by the same evidence which would have been required, if appearance had been made for the defender.

3. That even where the defender had not been cited personally, and where there had been no intimated reference to oath, a decret in absence would be sustained after his death, if it appeared that, after having a proper opportunity of objecting to the proceedings as having been held without sufficient evidence, he had allowed them to pass without challenge.

In this case, where the defender had omitted to call in question the validity of the decret, when such circumstances occurred as must have led him to do so, if he had considered the claim to be an unjust one,

The Lords adhered to the judgement of the Lord Ordinary, which "over-ruled the objection to the decret."

Ordinary, Lord Rockville. A&A. Macleod-Bannatyne, Dalzell. Alt. Honyman. Clerk, Menzies.

C.

N° CX.

February 9. 1790.

A N D R E W S C O T T,

A G A I N S T

J O H N V E I T C H, and others.

BANKRUPT.—Act, 1783. *A person carrying on the trade of building, though a writer by profession, intitled to the benefit of that statute.*

AN agent in the Court of Session, but who had engaged in the business of building houses for sale, presented a petition for sequestration under the authority of the statute of 1783. On the part of some of his creditors, it was

Objected :

Objected: That the application was not warranted by the statute, the petitioner being by profession a writer, and not, according to its terms, either a *merchant* or a *manufacturer, artificer, or mechanic*.

The Court however considered the petitioner, notwithstanding the different nature of his principal profession, as within the description of the statute, and therefore

The Lords awarded the sequestration, and upon advising a reclaiming petition, with answers, adhered to that judgement.

For Scott, &c. *G. Fergusson.*

Alt. N. Fergusson.

Clerk, *Menzies.*

S.

N^o CXI.

February 9. 1790.

The TRUSTEES of FRASER of LOVAT,

AGAINST

ALEXANDER CHISHOLM.

WADSET.—*Feu-duties may be the subject of a proper wadset, even where they are due by the wadsetter himself.*

THE family of Lovat were superiors of certain lands held by the predecessor of Mr Chisholm. In 1637, the former, on receiving the sum of L. 8000 merks, sold and disposed to the latter the feu-duties arising out of these lands, which amounted to 663 merks, redeemable upon payment of the first-mentioned sum. This conveyance contained a precept of feisin, and infeftment followed.

At this time the rate of interest authorised by law was 8 *per cent.* so that the feu-duties to be retained exceeded what could have been demanded for the use of the money lent out in the ordinary way. The creditor was also authorised to seek repayment of the sums advanced, if at any time the rate of interest should be increased.

intimated to the defender his resolution of making a reference to oath, it was competent, not only to the creditors, but also to the representatives of the defender, to bring it under challenge at any time, and that it would be necessary for the pursuer to support the decret by the same evidence which would have been required, if appearance had been made for the defender.

3. That even where the defender had not been cited personally, and where there had been no intimated reference to oath, a decret in absence would be sustained after his death, if it appeared that, after having a proper opportunity of objecting to the proceedings as having been held without sufficient evidence, he had allowed them to pass without challenge.

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The Lords adhered to the judgement of the Lord Ordinary, which "over-ruled the objection to the decret."

Ordinary, Lord Rockville. A^d. Macleod-Bannatyne, Dalzell. Alt. Honyman. Clerk, Menzies.

C.

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Alt. N. Fergusson.

Clerk, Menzies.

S.

N^o CXI.

February 9. 1790.

The TRUSTEES of FRASER of LOVAT,

AGAINST

ALEXANDER CHISHOLM.

WADSET.—*Feu-duties may be the subject of a proper wadset, even where they are due by the wadsetter himself.*

THE family of Lovat were superiors of certain lands held by the predecessor of Mr Chisholm. In 1637, the former, on receiving the sum of L. 8000 merks, sold and disposed to the latter the feu-duties arising out of these lands, which amounted to 663 merks, redeemable upon payment of the first-mentioned sum. This conveyance contained a precept of feisin, and infeftment followed.

At this time the rate of interest authorised by law was 8 *per cent.* so that the feu-duties to be retained exceeded what could have been demanded for the use of the money lent out in the ordinary way. The creditor was also authorised to seek repayment of the sums advanced, if at any time the rate of interest should be increased.

The debtor farther became bound "to warrant all and haill the fore-
 " said sum of 663 merks, to be yearly uplifted and retained in and
 " by all things, and to be safe and free from all and sundry perils,
 " dangers, accidents, claggs, claims, and inconveniencies whatever,
 " as well named as not named, present, bygone, and to come, against
 " all mortals, as law will, whereby the said annualrent, or any part
 " thereof, may be evicted, or the grantee debarred from the upta-
 " king and detaining thereof."

By different statutes in 1646, 1661, and 1713, the rate of interest was lowered to 6^l, to 6, and at last to 5 *per cent.* But owing to various circumstances, it was not till the 1788 that an action was brought by the Trustees of Mr Frazer of Lovat for ascertaining the nature of the above-recited agreement.

The chief question was, whether the right of the defender, Mr Chisholm, was to be considered as a *proper wadset*. For the pursuers, it was

Pleaded: In a proper wadset, the creditor is allowed to apply to his own use the whole produce of the lands conveyed to him, without any obligation to account, although the sums he thus receives may considerably exceed the legal interest of the money lent; and this may be considered as an equitable agreement, where the creditor's expectation of repayment is made entirely to rest on the uncertain value of landed property. Here the situation of matters is widely different. It is not the lands, either in property or superiority, which are here conveyed, but certain and determinate feu-duties, exceeding the legal interest of the money, even when this was at its utmost height, and exigible from the creditor himself. Besides, he has not only stipulated that these feu-duties should at all times remain undiminished, but also, that on an augmentation of the legal rate of interest, he should be allowed to demand payment of the sums advanced by him. If such a right as this can be considered as authorized by law, it must be viewed as an improper wadset, extinguishable, and, in fact, long ago extinguished, by possession. Bankt. b. 2. tit. 10. § 19. 20.; Ersk. b. 2. tit 8. § 26. 28.; 10th July 1718, Doull *contra* the Creditors of Winterfield.

Answered: An agreement, whereby a creditor accepts of the security of lands, or of the produce of them, in lieu of the personal obligation of his debtor, cannot be considered as illegal or usurious. There is as little reason to consider the bargain here occurring as an improper wadset, as has sometimes been done, even where there was no authority for redemanding the sums lent, if it appeared that the creditor had guarded against the hazard of getting less than what had been originally advanced by him, with the interest arising on it. In the present case, the risk run by the creditor is unquestionable; the obligation of warrandice, though inaccurately expressed, relating only to the right of levying the feu-duties, without insuring the permanency of them, while the power of requisition is limited

mitted to the case of an alteration of the law respecting the rate of interest.

That the subject of this wadset was those feu-duties which at the time were due by the creditor himself, cannot be thought of any importance. This circumstance was merely of a temporary nature, as the lands might be sold, while the wadset was retained; and even while both continued in the same person, the lands might be so much diminished in their value, as not to yield an adequate security for the money lent, with the growing interest. It is equally unimportant, that the feu-duties alone were wadsetted, without any conveyance of the lands themselves, the one being as much the subject of infeudation as the other, Stair, b. 2. tit. 10. § 9. 11.

The only difficulty seemed to arise from the manner in which the clause of warrandice was worded, some of the Judges considering it as insuring the extent of the feu-duties, as well as the right of levying them. The majority, however, were of a different opinion.

The question being reported to the Court on informations,

The Lords found, " That the wadset entered into in 1637, between
" Hugh, then Lord Lovat, and his brother, on the one part, and
" Alexander Chisholm of Comar, on the other part, of the lands
" therein mentioned, was a *proper* wadset, which is redeemable only
" on payment of the wadset-sum entire."

A reclaiming petition was preferred for the pursuers, which was refused without answers.

Reporter, Lord E/kgrove.

A&t. Blair, Honyman.

Alt. Wight.

Clerk, Gordon.

C.

N^o CXII.

February 11. 1790.

ATTORNEY of JAMES CANTLEY,

A G A I N S T

T H O M A S R O B E R T S O N .

PACTUM ILLICITUM.—*How far a Scotsman carrying on trade abroad, has action in this country for the price of contraband goods.*

ROBERTSON sent, by a ship bound to Rotterdam, and from thence back to Scotland, a commission to a trader in that place for a quantity of gin. The person to whom the commission was directed not being found, the shipmaster applied to Cantley, then settled at Rotterdam, but who was a native of Britain, had formerly carried on a smuggling traffic in the north of Scotland, and still held correspondence with people of this country engaged in illicit trade.

Cantley on this wrote to Robertson, desiring authority to execute his order, and requiring either a remittance for paying the shipmaster his freight in money, or an order for the payment of it in goods.

Robertson in answer gave the authority required, and ordered the freight to be paid in goods at the rate of *six shillings* per anker, being greatly beyond the allowance in fair trade. He added, in a postscript to his letter, that "he expected his goods to be delivered at Collieston," which is a noted place of rendezvous for smugglers.

Cantley shipped the goods, and took from the shipmaster a bill of lading, containing an exception of sea-hazard and *searchers*; and it bore the receipt of the above-mentioned rate of freight.

The cargo was seized on the coast of Scotland by the officers of the revenue; and Cantley having raised an action, in the name of an attorney, against Robertson,

The defender pleaded: The action being founded on a *pactum illicitum*, ought to be dismissed, the pursuer having been an accessory to the smuggling transaction. Mere knowledge, it may be admitted, that the buyer is acting for a British smuggler, and that smuggling is the object of the transaction, is not sufficient to constitute such accession; but, joined to this knowledge, there was in the present case an actual participation, by the pursuer's soliciting the commission, and by the whole other circumstances of the case.

The laws of this country will not permit a foreigner, more than a native, to violate them. Hence, the goods of a foreign merchant, seized

zed in the act of smuggling, are equally liable to confiscation as if they had been those of a subject; nor will action at his instance be sustained, if he be a party to the smuggle. But the accession of a native to an adventure in illicit trade, will be evinced by slighter circumstances than where a stranger is concerned, who owes no allegiance to our laws. Were a rebellion to exist in this country, a native residing abroad who should furnish arms which he knew were to be employed against the government, would stand in a very different predicament from that of a foreigner entering into the same transaction.

It may be added, that nothing contributes so much to the increase of contraband trade, as the interference of natives of Britain when abroad, whose knowledge of the country and of its inhabitants gives them so peculiar an advantage, which therefore it is highly necessary to check.

In conformity to these observations was the decision in 1779, in the case of Sibbald and Company *contra* Wallace*; and in the Court of King's-Bench, the English judges, in the case of Biggs and others *contra* Lawrence, 18th November 1789, refused action on this ground, that the plaintiffs, British subjects carrying on merchandise abroad, acted illegally in furnishing goods which they knew were to be imported into Britain in defiance of its revenue-laws.

Answered: A merchant having his residence abroad, whether a native of this country or a foreigner, is intitled to action here for the price of commodities sold by him, although he knew it was the intention of the buyer to import them in prejudice of the revenue, if he himself had no farther concern in the smuggle. This seems to be admitted; and were there any law to the contrary, it would lay such an embargo on the freedom of commerce, as it could hardly survive. Nor is it any objection to so obvious a doctrine, that British subjects in foreign countries are prevented by their allegiance from furnishing, in the way of trade, warlike implements to be employed against our government, which would be a true crime, a misprision of treason; whereas trespassing upon the revenue-laws is not in itself immoral, being rendered criminal by positive law only, which is not of force beyond its territory.

Accordingly, that action ought to be sustained in such cases, has been repeatedly found, Walker *contra* Falconar, 21st February 1757, and Moir and Irvine *contra* Steven, 13th November 1765. Nor is the case of Sibbald and Company of a contrary tendency; for there the smuggling bargain was entered into, not with a merchant residing abroad, but with a native at home, who engaged himself to import contraband goods, in defiance of the very laws to which he was subject at the time.

In like manner, in England, action was sustained for the price of contraband goods, because, in the words of Lord Mansfield, "though

* Not Collected.

“ the feller knew what the buyer was going to do with the goods, he “ had no concern in the transaction itself;” *Holman versus Johnson*, Cowper’s Reports, p. 341. As to the case of *Biggs contra Lawrence*, the transaction took place between parties in Britain, in the same manner as in that of *Sibbald* above mentioned.

Before the defence be sustained then, some accession to the running of the goods must be shown on the part of the pursuer. This could only be, by his having an active hand in the importation, by his being concerned in the profit or loss of the adventure, or by the payment of the price being made to depend upon the safe arrival of the goods. Nothing however of that kind appears from the *species facti*; nor indeed any thing farther on the part of the pursuer, than the knowledge of a design to run the goods, and a natural desire of a profitable transaction in the way of his business. It seems impossible to conceive that he could have been liable to penalties for illegal importation had he returned to Scotland, as the shipmaster or the defender would have been; which is the criterion by which to ascertain the point of accession.

Replied: It appears from the report in the case of *Holman*, that the sellers were a foreign company bearing no allegiance to Great Britain.

The Lord Ordinary sustained action; and the Court at first adhered to that interlocutor.

But a reclaiming petition, with answers, having come to be advised,

By some of the Judges the idea seemed to be entertained, that in cases of this nature, even without participation, from knowledge alone of the buyer’s purpose, the sale becomes an illegal act, so as to bar action. A British merchant carrying on trade abroad, it was observed, is by no means to be considered in the same light as a foreigner. He still continues bound by his allegiance to this country. If in furnishing arms to rebellious subjects he would be guilty of treason, his affording to smugglers the means of infringing the revenue-laws is also a public offence, even smuggling being a species of rebellion.

The Lords, by a very narrow majority, “ altered their former interlocutor, and assolizied the defender.”

A reclaiming petition having been presented against this judgement, it was, by the same narrow majority, refused without answers.

Lord Ordinary, *Stonefield*.

Ast. *Dean of Faculty*.

Alt. *Maconochie*.

Clerk, *Home*.

S.

N^o CXIII.

February 12. 1790.

ROBERT-BRUCE-ÆNEAS MACLEOD, and DAVID
URQUHART,

A G A I N S T

H U G H R O S E.

MEMBER OF PARLIAMENT.—*What deemed a refusal to take the oath introduced by the 7th Geo. II. cap. 16.*

MR ROSE was inrolled among the freeholders in the county of Cromarty, as wadsetter of the superiority of certain lands. He afterwards acquired the right of reversion; and being thus fully vested in the superiority, he conveyed the fee of it to another person, reserving to himself the liferent. After this, Mr Rose restricted his liferent to certain parts of the estate, in virtue of which he had been inrolled, still however retaining as much as in point of valuation intitled him to stand on the roll of freeholders.

While matters were in this situation, an objection to Mr Rose's continuing on the roll, was, in terms of the statute 16th Geo. II. lodged by Mess. Macleod and Urquhart, two freeholders in the county. Mr Rose at the same time preferred a petition to the freeholders, stating the proceedings which had been held, and desiring to be continued on the roll, in virtue of the right of liferent still belonging to him.

When the Michaelmas meeting in 1789 was constituted, Mr Rose was not present, and accordingly his name was not mentioned in the minutes taken down by the clerk. But having afterwards come into the court-room, without, however, proceeding to qualify himself for voting by taking the oaths to government, Mess. Macleod and Urquhart tendered to him the oath of trust and possession introduced by 7th Geo. II. On this Mr Rose quitted the room, saying, that he was not a member of the meeting. As soon as he was gone, it was proposed in his behalf, that the freeholders should take under their consideration what had been stated in his petition.

A majority of the freeholders determined, that Mr Rose's name should not be expunged. They immediately after over-ruled the objection that had been lodged against him; and likewise found, that he should retain his place on the roll.

In

In a complaint to the Court of Session, Mess. Macleod and Urquhart

Pleaded : Any person *claiming to vote* for a member of parliament, or *having a right to vote in adjusting the roll of freeholders*, may, in virtue of the statute of his late Majesty, be required by any freeholder then present, to take the oath thereby introduced, in order to show that he is in the right and possession of the lands in virtue of which he was inrolled ; and in case of his refusal, his name must be expunged from the roll of freeholders. Hence, after Mr Rose had declined to take the oath when legally tendered to him, the freeholders did wrong in allowing him to continue on the roll.

Whether Mr Rose, after being expunged, could have been again inrolled in virtue of a new claim, is of no importance. Not being judged of in the freeholders court, this question cannot be the subject of deliberation in the Court of Session. Indeed, were Mr Rose's freehold-qualification ever so unexceptionable as it now stands, it is evident, that after having undergone so material an alteration in his circumstances, he ought not to be allowed to retain his former place on the roll, 9th December 1780, George Fergusson *contra* Mungo Campbell ; 1784, Brodie *contra* Urquhart.

Answered : The oath introduced by the 7th of the late King, instead of the one prescribed by the 12th Ann. can only be tendered to a freeholder when he is proceeding to vote in the election of a member, or in adjusting the roll of freeholders ; and therefore, as Mr Rose had not even, by taking the oaths to government, put himself in a situation to act as a freeholder, there was no room for trying the validity of his qualification in the way here pointed out. In the case of a person admitted to the roll as the proprietor of a great estate, it has ever been understood, that his inrolment is effectual, notwithstanding any partial alienation, if the lands retained by him are sufficient for giving a right to vote. And the judgement of the freeholders must here be considered in the same light, as if, before entering into the question, whether, on account of Mr Rose's declining to take the oath, he should be expunged from the roll, they had proceeded to give a determination on the claim of restriction given in for him, in which case it is impossible to doubt that Mr Rose would have acted differently. The authorities quoted on the other side are quite inapplicable. In both cases, the freeholders required to take the oath had previously acted as constituent members of the meeting, having voted in the election of preses and clerk.

Replied : The present case has no affinity to that of a freeholder who has conveyed away a part of the lands which belonged to him when he was inrolled ; Mr Rose's original titles, and those on which he must now claim, being essentially different. But were the cases precisely the same, it would be of no consequence ; for whatever might have

have been said, if, before determining with regard to the propriety of putting the oath, the freeholders had restricted Mr Rose's claim, and if after this Mr Rose had declared his willingness to swear, the determination of the Court of review must be regulated by the proceedings as they actually took place.

The first judgement of the Court was, for "dismissing the complaint."

But after advising a reclaiming petition, which was followed with answers,

The Lords found, "That Mr Rose having refused to take the oath of trust and possession, his name ought to have been expunged from the roll."

A^ct. Blair, Abercromby.

Alt. Wight, Rolland.

Clerk, Gordon.

C.

N^o CXIV.

February 12. 1790.

JOHN DUN,

AGAINST

WILLIAM COLHOUN.

USURY.—A bill for the amount of annualrents, in which were included accumulations of interest made half yearly, set aside, action being sustained for principal and annualrents as payable by the original obligation.

COLHOUN, at the term of Martinmas 1774, granted to Dun a bond for L. 1000, payable at the succeeding Martinmas, with the legal interest for that first year, and until payment.

Some years after, when the parties came to settle accounts, Dun stated interest separately for each half year, upon which different sums he again reckoned interest; and he obtained from Colhoun a bill for L. 473, partly composed of those accumulations of annualrent.

An action having been brought for payment both of the bond and of the bill, the defender

Pleaded: By act of parliament in 1621, cap. 28. money-lenders are prohibited from "craving or receiving annual therefor, until the term of payment of their bonds be first come;" and it is declared, "that the contraveners of this statute shall be punished as unlawful usurers;" in which punishment is included the annulling of the obligation for the debt. In this case however the pursuer has, during a long period, *craved*, and in effect *received*, *annualrent* half a year before the term of payment, so that he falls under the description of this statute.

Again, it is by act 12th of Q. Anne, c. 15. enacted, "That all bonds for payment of money lent, whereupon or whereby there shall be received or taken above L. 5 in the L. 100 for a year, and so after that rate for a longer or shorter time, shall be utterly void, and that the receiver shall forfeit the treble value of the money lent." Now the pursuer has evidently "taken more than after the rate of L. 5 in the L. 100 for a year," that being the term before the expiration of which no interest was due by the bond.

Answered: The object of the act 1621 was not to prevent the payment of interest half yearly, or for any period already past, but merely to prohibit a whole year's interest being received at the time of lending, by which means a rate of annualrent higher than the legal one would be exacted. That enactment, however, is now circumscribed by the statute of Q. Anne.

The last-mentioned statute is likewise calculated to debar lenders from extorting more than the legal annualrent for the time of the forbearance of payment; and accordingly when the rate of interest for a year is mentioned, it is added, "and so after that rate for a shorter or longer period." This rate the pursuer has not exceeded. Nor is there any thing usurious or improper in reckoning annualrent of half-yearly interests, which is justified by the ordinary practice of bankers and others. Vid. Bacon's Abridgement, *voce* Usury.

But although the receiving of interest in this case had been usurious, and had subjected the pursuer to the penalty of treble value, which, in the present action, is not even claimed, yet the bond or the bill themselves, as they bear no unlawful stipulation, would not be forfeited; for those obligations only are declared to be void, "whereupon or whereby above L. 5 in the L. 100 shall be taken." Such has been uniformly the decision of the English courts. Hawkins' Pleas of the Crown, 247. § 14.

Replied: In Atkin's Reports, 3. 154. Adlington *versus* Carr and Andrews, 3d July 1744, the opinion of Lord Chancellor Hardwicke to the contrary is stated.

The Lord Ordinary at first pronounced the following judgement:
" Finds

“ Finds no sufficient cause for applying the penal statutes against
 “ usury in this case; but finds sufficient ground in law and equity
 “ for reducing and restricting the pursuer’s claim to the original prin-
 “ cipal sum and annualrent, without any accumulations.”

His Lordship having afterwards reported the cause, the Court in effect adopted the same interlocutor by the following:

“ The Lords repel the defences pleaded against payment of the
 “ bond pursued for; and find, that no action can lie upon the bill,
 “ in respect the same was in part made up of undue exactions; and
 “ that the pursuer’s claim must be restricted to the principal sum
 “ contained in the bond, and annualrent thereof.”

Reporter, *Lord Gardenston.*

Act. Dean of Faculty.

Alt. M. Refs.

Clerk, Home.

S.

Nº CXV.

February 17. 1790.

The BANK of SCOTLAND,

A G A I N S T

The CREDITORS of DANIEL TELFER.

WRIT.—*Error in the name of one of the witnesses inserted in the testing clause of a bond, how far remediable.*

MR DANIEL TELFER having, alongst with several others, interposed his credit with the Bank of Scotland for the partners of a mercantile company, the bond executed for this purpose was regularly subscribed by him; and opposite to his subscription, those of Alexander Gillespie and *Robert Dickson* were annexed as witnesses.

This bond was transmitted to Mr James Frazer the secretary of the bank, by whom it had been written; and he immediately filled up the blank which had been left for inserting the names and designations of the witnesses. So far as related to Mr Telfer, the testing clause mentioned his having subscribed “ before Alexander Gillespie
 “ vintner at Douglas Mill, and *Robert Gibson* his servant.”

After

After this, the bond remained for a considerable time in the custody of the Bank. A notorial copy of it was taken; and the persons for whose accommodation it was granted having become bankrupt, a claim was made for the Bank in the distribution of their effects. But during all these proceedings, the bond had never been put on record, nor exhibited judicially.

Mr Telfer conveyed his estate to a trustee for his creditors, who discovered the blunder that had been committed in filling up the testing clause, one of the witnesses being named *Robert Gibson* instead of *Robert Dickson*; upon which Mr Fraser, the secretary of the Bank, made the following addition to it: "I say *Robert Dickson* his servant, the word '*Gibson*' being a chirographical error of the writer in filling up the last line of the testing clause, all written by the said James Fraser." In a bill of suspension preferred by the trustee for Mr Telfer's creditors, it was

Pleaded: By our ancient law, it was sufficient that the subscription of the party should be authenticated by credible witnesses who were present at the execution of the deed. But as this opened a door to many frauds, by the latitude given in receiving the testimony of any person who would swear to the actual subscription, the statute of 1681 wisely provided, that the witnesses should subscribe along with the party, and that their names and designations, as well as those of the writer of the deed, should be inserted in the body of it; "and that all such writings wherein the writer and witnesses are not designed, should be null, and should not be suppliable by condescending upon the writer, or the designations of the writer or witnesses." The bond in question, therefore, as it was made out, was illegal and void, *Robert Dickson*, who subscribed as one of the witnesses, not being designed, while *Robert Gibson*, whose name appears in the testing clause, has not subscribed.

The method which has been taken to remove this imperfection, does not appear to be warranted by the law. If it be incompetent, where the subscribing witnesses are not designed, to bring a proof who those witnesses were, it must be still more so, without any proof, to substitute other names and designations, instead of those which were originally inserted. In the many recent cases where an error in the names of the witnesses has been found to be a fatal one, it never occurred, that by the expedient here used the objection might be removed.

It is of no consequence, that the alteration was performed before the document had been produced in a court of justice; no reason can be given for a distinction so arbitrary. It is indeed usual, at the time of subscribing a deed, to leave a blank for the testing clause, this being afterwards filled up by the writer. But from this practice, though it were more regular than it is, it will not follow, that the testing clause, after it is once filled up, may at any time be altered and amended at his pleasure. Such a latitude, allowed at a period when false writings are

are every day becoming more common, would be attended with the most mischievous consequences. Indeed the objection seems to be the stronger in this case, as it is not expressly said, whether the author of the alteration was the writer of the deed, or whether it was performed by some other person, Fountainhall, 15th July 1707, Abercrombie *contra* Innes; 26th December 1752, Creditors of Graham *contra* Grierfon; 17th November 1787, Archibalds *contra* Marshall; 28th November 1787, Douglas, Heron, and Company *contra* Mrs Helen Clerk.

Answered: Though it is required by the enactment of 1681, that the names and designations of the writer and witnesses should be inserted in the body of every written instrument, it is no where said, that this is to be done at the time when the writing is subscribed by the granter. Where the parties subscribing live at a distance from each other, or from the writer of the deed, and in many other cases, that would be impracticable; and hence it is usual, between the clause authorising the registration and the subscription of the party, to leave a blank for this purpose, which is afterwards filled up. It often happens too, that in opening the repositories of persons deceased, bonds and other documents are discovered without any testing clause, but accompanied with a note of the names and designations of the witnesses, which is understood to be a sufficient authority for supplying the defect, even after the death of those who were parties to the deed.

Thus it is evident that the bond in question, though subscribed by the debtor when the testing clause was wanting, might be afterwards rendered complete by inserting the names and designations of those who had subscribed as witnesses. And as it will not be disputed, that an error in transcribing the name of one of the witnesses, might at the time be rectified either by an erasure, or by such an explanation as was here given, it seems impossible with reason to maintain, that this may not be done at any time when the testing clause itself may be filled up; that is, at any time before the writing is made the subject of litigation, when the rule is, that *Pendente lite nil innovandum*. The observation, that the author of the alteration is not distinctly pointed out, seems hardly to merit an answer. It is clearly stated, that the alteration was made by Mr Frazer, the writer of the deed; and this is also apparent from an inspection of the writing itself. At any rate the objection is of no consequence; for although the name of the writer of the deed must be mentioned, that of the filler up of the testing clause is not necessary, as has been frequently decided; December 1683, Watson *contra* Scott; 19th June 1722, Laird of Edmonstone *contra* Lady Woolmet; 11th March 1753, Alexander Durie *contra* David Doig.

The question was reported to the Court on memorials, by the Lord Ordinary on the bills.

The Lords were unanimously of opinion, that the objection was ill founded ; and the bill of suspension was, of course, refused.

Reporter, *Lord Henderland.*

A&C. *Honyman..*

Alt. *J. W. Murray.*

C.

N^o CXVI.

February 19. 1790.

The TRUSTEE on the Sequestrated Estate of ANDREW SWINTON,

A G A I N S T

Sir WILLIAM FORBES, JAMES HUNTER, and COMPANY.

BANKRUPT.—Act, 1696. Securities for prior debts, how far liable to challenge, when not immediately injurious to the creditors at large.

SIR WILLIAM FORBES and COMPANY were creditors in several bills of exchange granted by Andrew Swinton. These bills having been dishonoured, letters of horning and caption were issued.

Being unable to pay the sums due, Swinton applied to a gentleman of the most undoubted credit, who agreed to interpose his security, by indorsing to Sir William Forbes and Company a promissory note subscribed by Swinton. On the same day, a vendition of a ship belonging to Swinton was executed in favour of the cautioner. Within three weeks after, Swinton was rendered bankrupt in terms of the act of 1696.

Afterwards a sequestration was awarded ; and the trustee having signified his intention to challenge the above-mentioned transaction, the cautioner preferred a bill of suspension, in which he contended, that the efficacy of his obligation depending on that of the vendition, he could not be obliged to pay, until it was determined whether the transference in his favour was effectual or not.

This bill of suspension was refused. An action was then brought by the trustee on Swinton's sequestrated estate, for setting aside the promissory note granted by the bankrupt, and indorsed by the cautioner, and also the vendition of the ship, as falling under the statute

tute of 1696. A proof was offered, that before the interposition of the cautioner, Swinton had proposed to execute the vendition in favour of Sir William Forbes and Company, and that the subsequent bargain had been completed with the knowledge of the agent employed by them in this business. The pursuers

Pleaded: The statute of 1696 strikes against all securities, directly or indirectly, granted by a bankrupt in favour of a particular creditor to the prejudice of the rest. It must therefore be fatal to the preference here obtained by Sir William Forbes and Company. It is not necessary in such a case, that the preferred creditor should at the time be in the knowledge of the wrong which is intended; it is enough that the granting of the security by the bankrupt, was such as is reprobated by the law. In the present instance, however, it is evident, that Sir William Forbes and Company, or, what is the same thing, the person employed by them, knew the whole circumstances of the transaction. Such was the embarrassed situation of the debtor, that no security immediately given by him could be of any use; and thus the interposition of the cautioner is to be considered merely as a cover, for obtaining, in an indirect manner, a right equally injurious to the creditors.

To transactions of this kind the Court has often refused its sanction. Thus in a case, where, in order to give to an heritable security obtained by a favourite creditor the appearance of a new loan, it was contrived, that the creditor should advance the money to a trustee, in whose name the investment should be taken; the security was set aside, in the same manner as if it had been immediately granted to the creditor himself. In a more recent instance, where a bankrupt, desirous of relieving his cautioner, had obtained a farther loan from the creditor, upon giving an heritable security for the whole sums due by him, the investment, so far as it tended to relieve the cautioner, was annulled. There, it was contended, that the cautioner was wholly ignorant of the circumstances of the debtor; it even appeared, that he had afterward trusted him with much larger sums on his personal security only; but this did not prevent the operation of the statute, 9th March 1781, *Blackie contra Robertson*; *Grant of Artamford contra the Creditors of Grant* in 1789.

Answered: For annulling a deed in consequence of the statute of 1696, it is not enough that one of the creditors has obtained some additional security within the sixty days immediately preceding public bankruptcy. It must also be shown, that by means of this security, those funds which otherwise would have been divided among the creditors at large, have been appropriated to a favourite individual. Without this, the former have no interest to challenge the transaction, however beneficial it may have been to the latter.

This general rule was not broken through in the cases referred to on the other side. In that of *Blackie contra Robertson*, the money for which the heritable security was granted had been advanced by the favourite creditor, and immediately returned to him, so that the
wrong

wrong done to the other creditors was apparent. So too in the subsequent case, it was justly found to make no difference, whether the debtor, within the sixty days before his bankruptcy, had granted an heritable bond of relief to his cautioner, or to the creditor in whose favour the cautioner had interposed his security.

The present case is widely different. Unless it could be shown that the cautionary engagement, effected by the indorsement of the bankrupt's promissory note, and the vendition of the ship in favour of the cautioner, were the mutual causes of each other; it is evident that the former, by which the creditors of the bankrupt were no wise injured, may be sustained, while the latter, if really fraudulent, may be set aside.

It was separately contended for the pursuers, that the mere granting of the promissory note was injurious to the creditors, Sir William Forbes and Company being thus enabled to rank more than once for the same debt. No attention, however, seems to have been paid to this argument.

The Lord Ordinary sustained the reasons of reduction: thus setting aside the indorsement in favour of Sir William Forbes and Company, and the vendition obtained by the cautioner. And this judgement was acquiesced in by the cautioner, although he preferred a representation to the Lord Ordinary, craving, that his claims of repetition against Sir William Forbes and Company might be reserved.

After advising a reclaiming petition for Sir William Forbes and Company, with answers, the Lords altered the judgement pronounced by the Lord Ordinary, and found, That the granting of the promissory note by the bankrupt did not fall under the statute of 1696.

It seemed to be the opinion of the Court, that if there had been any concert between the parties, for the purpose of giving a preference to Sir William Forbes and Company, in consequence of the vendition granted to the person who had interposed as cautioner, the judgement of the Lord Ordinary might have been sustained; but no agreement of this kind appeared. And although Sir William Forbes and Company, or their agent, might have been informed of the bargain between the cautioner and the bankrupt, this did not derogate from the validity of the agreement between Sir William Forbes and Company and the cautioner.

A reclaiming petition was afterwards preferred for the trustee on Swinton's sequestrated estate, and refused without answers.

Ordinary, *Lord Monboddo*.
Clerk, *Home*.

Act. Maconochie, Mat. Refs.

Att. Solicitor-General.

C.

CXVII.

N^o CXVII.

February 19. 1790.

Mrs ELISABETH CHALMERS,

AGAINST

Mrs HELEN DOUGLAS, and her HUSBAND.

HUSBAND AND WIFE.—*No execution against a wife's person for a debt ex delicto, incurred during the marriage. Nor is the husband liable, or the goods in communion, on that ground. But for the expences awarded to the pursuer, the husband is liable as dominus litis.*

IN an action of defamation and damages, the Commissaries having found sufficient evidence that the defender Mrs Douglas, “ was guilty of the scandal libelled,” decreed her to pay to the procurator-fiscal of court a considerable fine, and to the injured party farther sums in name of damages and of expences, as also, to make a palinode; the fine, however, being to be restricted to a third of its former amount, “ in case she should appear in court, and judicially repeat and subscribe the palinode.”

Both parties brought the judgement under review by advocacy; the defender, beside objecting to the judgement in general, complaining, that the Commissaries had not qualified their sentence by declaring, that no execution during her marriage could issue against her person, or her effects falling under the husband's *jus mariti*; and the pursuer complaining, that they had omitted to decern against the husband for the expences of process.

The Lord Ordinary on the bills reported the cause, and afterwards a hearing in presence took place on the following points:

1. Whether execution ought to pass against the defender's person, to compel payment of damages and fine.
2. Whether the husband, or the goods in communion, were liable for payment of the money awarded in name of damages, or of fine.
3. Whether the expences of process found due to the pursuer, could be demanded from the husband, as having in that character concurred in the defence.

On the first point, it was

Pleaded for the defender: A married woman, it is unquestionable, can come under no civil obligation, though with the consent of her husband, which shall be the ground of diligence, either against her person or her separate estate. Neither ought a different rule to be followed, if a fine has been imposed, or money decreed against a wife for reparation of damage. As not only her moveables, but the rents also of her heritage, belong to the husband *jure mariti*, it is evident, that without infringing his right, nothing could be recovered by diligence against her. Even were her *paraphernalia* to be attached, it would be incumbent on him to replace articles so indispensably necessary. Unless, therefore, where there is an estate exclusive of the *jus mariti*, no such diligence can proceed. Bankt. b. 1. tit. 5. § 69.; Ersk. b. 1. tit. 6. § 24.; Dict. *voce* Husband and Wife; Stewart *contra* Bannerman, 16th February 1633; Home, Edgar, 2d July 1724, Murray; Kilkerran, 5th December 1738, Gordon *contra* Paine.

Answered: By that rule, married women may, with impunity, commit scandals, batteries, or any crime the punishment of which is pecuniary. For not only is it a chance whether the wife shall survive her husband or not, but the goods in communion may be so destined, that nothing can be attached on the dissolution of the marriage. Such a departure from the maxim, that *culpa tenet suos auctores*, would be alarming to society. Nor are instances wanting in our law of a contrary tendency. Thus, "horning against a married woman for not finding caution in a lawburrows was sustained," Haddington, 27th July 1613, Lord Roxburgh *contra* Countess of Orkney. Again, "caption was ordained to proceed against a wife, seeing the horning was not upon a debt, but upon her delinquency," Stair, 8th January 1679 — in Glasgow supplicant. And "execution was ordered to pass against a wife, for her contumacy in refusing to exhibit writings," Fountainhall, 16th November 1678, Sibbald, Dict. *voce* Husband and Wife.

Every wife may have effects exclusive of the *jus mariti*; and *paraphernalia* at least are always in that situation. A son living in family with his father, or a bankrupt whose funds have been sequestrated, might with as much reason be exempted from diligence, as being not less presumed to have nothing of their own; but since notwithstanding this, it has never been supposed that they enjoy any such immunity, the same circumstance must be an equally insufficient ground for the exemption in question; nor has any other been assigned. The only legal criterion by which to determine in any of the cases, whether an estate from which the debt may be repaid exist or not, is the use of personal diligence, and therefore in all of them it ought to be alike permitted.

A married woman is as liable to other punishments, to imprisonment, for example, as if she were sole. But if she may be imprisoned *in modum pænæ*, why not also when this legal step is taken towards the recovery of a fine or of damages?

Replied:

Replied: All the cases quoted on the other side, were either those of lawburrows, in which imprisonment follows of course until bail is found, or of obstinate refusal in a party legally required *ad factum præstandum*.

The Court were of opinion, that execution ought not to be allowed to pass against the wife's person during the subsistence of the marriage.

With respect to the *second* point, viz. Whether execution could proceed against the husband, or the goods falling under the *jus mariti*, he

Pleaded: If execution were to pass either against a husband's person, or against the goods in communion, the maxim already appealed to would be in some measure reversed, one party being punished for the offence of another. No doubt a husband would be interested in the corporal punishment of the wife, as all near relations must be in the fate of one another. But there is a very palpable distinction between such a case, and that where a fine for her transgression is levied out of funds to which he has right; and therefore, as a husband is not liable for any civil obligation contracted by the wife during marriage, so he is as little responsible for her debts arising *ex delicto*; a conclusion fully warranted by the authorities formerly quoted.

Answered: It seems that no debt can ever subsist against a wife's person, without being extended against the husband. There are but two cases in which a personal obligation of debt can lie on a married woman; one, in which it has been contracted before marriage, and the other where it has originated in her delict. In the first case, it is indisputable that the husband is liable. Why then should a different rule obtain in regard to the second? Not surely, because a debt which is the consequence of the wife's offence, is not to be demanded from a husband innocent of the crime; for it is clear, when a debt has been incurred before marriage, that the husband is equally liable, whether it be *ex contractu* or *ex delicto*. Yet in the latter case, the defender's argument, that those who are innocent should not suffer the punishment of the guilty, would not be less applicable than it is at present. The goods in communion, it must be admitted, are subject to the husband's debts *ex delicto*; but is not this punishing the innocent wife for the fault of her husband?

In the Roman law, and likewise in that of England, it is established, that husbands are liable for their wives debts arising *ex delicto*. Voet. ad. tit. ff. de Judiciis, § 17.; Bacon's Abridgement, *voce Baron et Femme*, p. 294. 295.; Blackstone, b. 1. c. 15. § 3.; b. 4. c. 2. § 6. And in the above-cited case of Lord Roxburgh *contra* the Countess of Orkney, it was found, "That a wife's liferent-escheat fell on her denunciation at the horn;" the plain effect of which was, to deprive her husband of his possession *jure mariti*.

The

The opinion of the Court was, that neither the person nor the effects of the husband could be thus affected.

With regard to the husband's being liable for the expences of process, he

Pleaded: Finding a party liable in expences of a process, implies some wrong done. But there was nothing wrong in a husband's voluntarily allowing his name to be used, along with that of his wife, as defender in an action brought against her, a thing that he might have been compelled to do; or in affording to her the means of supporting her defence, to which he might have been likewise compelled.

Answered: Such interposition is not to be understood as if it were nothing more than a piece of mere form. The husband became thus the *dominus litis*, and answerable for the impropriety committed by maintaining calumnious and injurious pleas.

The Court considered the husband to be liable in regard to the expences of process.

With respect to that part of the Commissaries judgement which decreed a palinode, the Court unanimously thought it improper, and seemed to reprobate the practice in general of requiring palinodes. Accordingly, in another action of defamation and damages, at the instance of George Lowther senior and George Lowther junior, against James Rae, a palinode awarded by the Commissaries was at the same time dispensed with.

In consequence of the opinion of the Court upon the whole cause, the Lord Ordinary pronounced the following interlocutor:

"Remits the cause to the Commissaries, with the following instructions: *1mo*, That they adhere to their interlocutor, finding the defender liable in damages, &c.: *2do*, That they alter their interlocutor with respect to the palinode, and dispense with the same: *3tio*, That they find, that legal execution cannot pass against the person of the defender during the subsistence of her marriage, for any sums awarded in name either of damages, fine, or expences, and that the effects and person of her husband cannot be affected for the sums awarded in name of damages and fine: *4to*, That they adhere to their interlocutor, finding the defender liable in the expences of the process, and in the expence of extract; and that they also find the husband personally liable to the pursuer for these expences."

Reporter, Lord Dreghorn.
of Faculty, Wight, Cullen.

A&A. Lord Advocate, Solicitor-General, Ross, Corbet.

Alt. Dean

S.

N^o CXVIII.

February 23. 1790.

WILLIAM NISBET,

A G A I N S T

CHARLES HOPE.

MEMBER OF PARLIAMENT.—*In questions respecting freehold-claims, an extract of a charter from the records of Chancery not admitted.—Whether a husband can be inrolled in virtue of his wife's infeftment in a superiority.*

WILLIAM NISBET claimed to be inrolled among the freeholders of the county of Linlithgow, in the right of his wife, whose estate, acquired by singular titles, and partly consisting of a right of superiority alone, was rated in the cess-books at L. 406 : 6 : 8.

In evidence of his wife's right to the lands, Mr Nisbet produced an extract from the records of Chancery of a charter in her favour, with an instrument of feisin, in which it was mentioned, that the wife's attorney had produced, as the warrant of her infeftment *quandam resignationis chartam sub sigillo per unionis tractatum custodiend. et in Scotia loco et vice magni sigilli ejusdem utend. ordinat. præceptum fasinae subinfertum in se continen. de data, &c.*

Mr Hope, a freeholder in the county, objected to this claim, 1. That the extract from the records of Chancery was not sufficient; and, 2. That a husband could not be inrolled in consequence of a right of superiority belonging to his wife. The freeholders refused to inrol. Mr Nisbet therefore complained to the Court of Session, and

Pleaded: An extract from any legal record, is equally respected with the principal writing itself, where its authenticity is not called in question; and therefore the extract from the Chancery here produced, ought to have been sustained as full evidence of the charter, which was duly registered there. It may perhaps be said, that being only a copy of a charter as it was prepared for passing the great seal, it does not appear from thence that the great seal was actually affixed to it. This objection, however, seems to be fully removed by the instrument of feisin, from which it appears, that the charter had been completed in the usual manner.

The other objection seems to be equally erroneous. It is declared by the statute of 1681, that husbands shall be intitled to vote for the freeholds of their wives; and thus, whatever would be the foundation of a right to vote if belonging to the husband himself, must be

equally available to him when belonging to his wife. And although by the subsequent enactment of 12th Anne, it was provided, that "no husbands should vote at any ensuing election, by virtue of their wives infeftments, who are not *heireffes*, or who have not right to the *property* of the lands on account whereof such vote shall be claimed;" this was thrown in merely to prevent the creation of occasional votes on the eve of an election, in the shape of liferents or redeemable rights, granted to wives for the purpose of enabling their husbands to act as freeholders. Wight on Elections, p. 239.

Answered: As the seals in grants from the Crown, are what the subscription of an individual is in conveyances obtained from a subject, it was wisely provided by act 1672, c. 7. in order to prevent an improper or incautious use of them, that a record of all writings should be made up preparatory to their being authenticated in this manner. It may therefore be admitted, that an extract from this record is complete evidence of the charter or other writing having been prepared for passing the seals. This, however, is no evidence of the great seal having been affixed; and until this be done, a Crown-charter is no more than an inchoated deed, which may be, and often is allowed to remain for ever in the same state. As to the instrument of feisin, it is merely the assertion of a notary, to which, unless it is supported by the relative writings, no regard can be paid.

2dly, A husband, since the enactment of 12th Anne, cannot be inrolled in virtue of his wife's infeftment, but in two cases; 1. where she is an *heirefs*; and 2. where she has the *property* of the freehold. In this enactment, as well as in feudal language, *property* is distinguished from *superiority*. Thus it is understood in the statute of 1681, where it is declared, that only "those shall have right to vote, who are publicly infeft in *property* or *superiority*." And indeed, as those precautions which have been used for preventing the undue multiplication of freehold-qualifications, do not in general extend to the case of husbands claiming inrolment in right of their wives, such a limitation seems to be absolutely necessary.

Several of the Judges expressed an opinion, that both objections were well founded. But the former being the preliminary one, it appeared to be chiefly on this ground, that, after advising the petition and complaint for Mr Nisbet, which was followed with answers, replies, and duplies,

The Lords dismissed the complaint.

A^a. Wight.

Alt. Williamfen.

Clerk, Colquhoun.

C.

N^o CXIX.

February 23. 1790.

C H A R L E S G R E Y,

A G A I N S T

C H A R L E S H O P E.

MEMBER OF PARLIAMENT.—Act, 16. Geo. II. cap. 11. *Seisin of a claimant imperfectly recorded.*

THE estate in virtue of which Mr Grey claimed to be inrolled as a freeholder in the county of Linlithgow, was partly composed of the lands of Drumbowie, which were rated in the cels-books of the county at L. 166 : 13 : 4.

Mr Grey had been duly infeft in these lands on 18th September 1788 ; and on 22d September, he received from the depute-keeper of the register the instrument of seisin, with the usual attestation on the back of it, bearing, that it had been duly recorded.

But in transcribing the instrument of seisin into the record, the lands of Drumbowie, though specified in the precept of seisin inserted in the introductory part of the instrument, were omitted in the clause where the notary attests that delivery was given. This was not observed till 24th September 1789, and it was immediately intimated to Mr Grey's agent, who insisted, that the keeper of the record should insert the omitted lands in a marginal note, which should be authenticated by his subscription. This however the keeper did not think himself warranted to do. The record-book in the particular register where Mr Grey's seisin was ingrossed, is not kept by a deputy of the Lord Clerk Register, as is directed by the statute of 1617, but by a clerk appointed by the Crown. At the time when this oversight was observed, it had not been signed by the keeper.

At the Michaelmas meeting held on 1st October 1789, when Mr Grey's claim was exhibited, an objection, arising from the circumstances already mentioned, was stated by Mr Hope, one of the freeholders. And this objection having been sustained, Mr Grey complained to the Court of Session, and

Pleaded : For the purpose of intimating to the public the alienation or burdening of lands, our law has required the registration of seisions, and other writings of the same kind, and that within forty-eight hours after they are presented to the keeper of the record. Nor has the

the interest of the private party been less the object of attention ; it being provided, that within the same short space, the feisin or other writing shall be returned to him by whom it was presented, with an attestation, bearing the day, month, and year of the registration, and in what part of the record the particular writing is to be found, Act, 1617, cap. 16.

In process of time, however, when, from the multiplicity of commercial transactions, the actual booking of the whole writing within so short a period as forty-eight hours became impracticable, the keeper of the register was required to have a minute book, in which the date of presenting the deed, a general description of the lands, with the names of those who were parties to the business, should be immediately inserted, leaving the registration itself to be afterwards performed as soon as it could be done, in the same order in which the different writings appeared in the minute-book. In this way, this short marking in the minute-book has come to be considered as the commencement of the registration ; and until the whole has been completed in the fullest manner, it is to the instrument of feisin itself, attested by the proper officer, especially where this is confirmed by the marking in the minute-book, that attention is to be paid. Act, 1672, cap. 16. ; 1693, cap. 14.

Thus, if no part of the feisin in this case had appeared in the record, the claim of inrolment founded on it would have been nevertheless unexceptionable. And surely the omission as to a part, which it was in the power of the keeper of the register to remedy cannot be more fatal to it. Indeed in this case it may be justly doubted, how far any part of the feisin has been recorded as the statute requires. On these principles it was decided, where a feisin had been attested and marked in the minute-book, that the circumstance of its not having been transcribed into the record till within a year of the inrolment, did not affect the freeholder's right. To give a different determination, would be to invest the keeper of the record with a power of rendering ineffectual at pleasure the most important rights which can be exercised by the landholders of this country. Wight on Elections, p. 206. 9th February 1768, Sir Alexander Mackenzie and others, *contra* Macleod of Cadboll.

Answered : The statute of 16th Geo. II. cap. 11. requires the registration of the freeholder's intestment twelve months before he is inrolled. By this must be meant, a registration with regard to all the lands on which his claim is founded. The purpose of the law, which was to give an opportunity of examining into the real situation of those feudal rights, which are to be productive of so important a privilege, most evidently requires, that it shall appear during the whole of the statutory period, what the lands are in virtue of which an inrolment is to be demanded : And thus the claim which was here rejected, seems no less irreconcilable to the words than to the meaning of the law.

The determination, finding that a delay in transcribing a feisin into the record, was not fatal to a claim for inrolment, the feisin having

ving been duly entered in the minute-book, and thereafter exactly engrossed in the record, though not within forty-eight hours from the date of the presentation, and perhaps not within sixty days from the date of the infeftment itself, is inapplicable to the present case. There, the question was not with regard to the registration, which was to all appearance regular and complete, but with regard to the date of it: And as in many cases the transcribing of the writing into the register cannot be performed within the time above mentioned, while, from the seisin itself being retained by the keeper of the record till this actually takes place, no injury can arise to third parties, the decision may be considered as a proper one.

But where, as in the present instance, the record, as it is made out, does not mention a part of the lands contained in the infeftment; it is evident, that without overthrowing at once the whole system of the public registers, no regard can be paid to it, so far as relates to the omitted lands. If there can be said to be any record at all, it is an imperfect and vitiated one, and therefore useless. If again the writing is to be considered as unrecorded, the requisites of the statute of his late Majesty have not been observed. The proposed insertion of the omitted lands into the margin of the record, after the lapse of much more than sixty days after the date of infeftment, could give no validity to it which it had not before; nor could this be done by the keeper of the record, who is intrusted with the filling up of the register, but who has no power to correct or alter it.

The consequences of this doctrine are evidently most just. It is the fault of him who presents a seisin to the keeper of the record, that it is not published in the most regular manner; because it is in his power, by examining the register as soon as it is filled up, to see, whether the necessary accuracy has been observed. But were any imperfection in the records to be remedied in the way here proposed, the loss would fall on those who are altogether free from blame, as having been authorised by law to rely on the fidelity of the registers.

The Court were unanimously of opinion, that the judgement of the freeholders was well founded. Where it appears from the record that a seisin has been engrossed of the same date with the attestation on the back and the marking in the minute-book, this, it was observed, could not be redargued by parole-testimony, without giving more credit to the keepers of the register than to the record itself. The case here was very different; the claimant wishing to set up the presumptive evidence, arising from the indorsation of the seisin, and the marking in the minute-book, against the record.

After advising the petition and complaint, which was followed with answers, replies, and duplies,

“ The Lords dismissed the complaint.”

A reclaiming petition was preferred, to which answers were given in ; but the Lords adhered to their former judgement.

A&A. *Wight, W. Robertson, et alii.* Alt. *Blair, Honyman, Hope, et alii.* Clerk, *Menzies.*

A separate complaint was, at the same time, preferred against the keeper of the register, insisting that he should be ordained to amend the record, and for damages and a fine. The Lords found damages due, and imposed a fine of L. 5, but they would not in this case authorise any alteration to be made in the record.

C.

N^o CXX.

February 24. 1790.

The CORPORATION of SHOEMAKERS of PERTH,

A G A I N S T

ELISABETH MACMARTIN.

BOROUGH-ROYAL.—*The daughter of a soldier found not intitled to authorise her husband to carry on a trade within borough.*

ELISABETH MACMARTIN, the daughter of a private foldier, having married Cameron a shoemaker, he, as in her right, under the act of parliament 3d Geo. III. began to exercise his trade within the town of Perth ; on which account the corporation of that craft preferred to the magistrates a complaint against him.

In a process of advocacy, it was

Pleaded for Elisabeth Macmartin: The statute of 3d Geo. III. has enacted, " That all such officers, foldiers, &c. who have been employed in the service of his Majesty, and also the *wives* and *children* of such officers and foldiers, may set up and exercise such trades as they are *apt and able for*, in any town within the kingdom of Great Britain," &c. Now, as it is obvious that none of the handicrafts which come under the exclusive privileges of corporations either in England or Scotland, are such as women can be presumed

med "apt or able" to perform with their own hands, the privilege thus conferred on the wives and children of soldiers, must be that of employing other persons to execute work *bona fide* for their behoof. The defender is therefore well intitled to exercise this trade by means of her husband.

Answered: In the preamble of the statute, those soldiers who are to enjoy the privilege bestowed by it, are described as at least "apt and able to make use of the respective trades;" but according to the defender's plea, their wives and *children* would be more privileged than they themselves. It is evident besides, that were this interpretation of the statute to be sanctioned, it would give such opportunities for collusive devices, that the whole benefit of incorporated trades would be annihilated.

The Lord Ordinary found, that the defender had no title to the privilege claimed by her; and

The Court adhered to that interlocutor, on advising a reclaiming petition with answers.

For the Corporation, *Drummond.*

Alt. *Dean of Faculty.*

Clerk, *Menzies.*

S.

N^o CXXI.

February 25. 1790.

COLIN MORISON and others,

AGAINST

JAMES KER.

FORUM COMPETENS.—*An English administrator, living in Scotland, may be sued here.*

ALEXANDER KER, having his residence in England, bequeathed the liferent of his estate, which consisted of moveables, to his sister Janet Ker, and, after her death, to *his next lawful heir or heirs of blood.*

Upon

Upon the testator's death, Janet Ker took out letters of administration in the prerogative-court of Canterbury, and obtained possession of the whole effects.

Those effects Janet Ker delivered over to James Ker, who after her was one of the nearest of kin to Alexander Ker, and who also claimed to be his heir, if the destination in the will already mentioned should have the effect of excluding the nearest in kin.

Janet Ker having also died, James Ker, who had his residence in Scotland, was, as her representative, sued in the Court of Session by Colin Morison and others, claiming, as the nearest in kin of Alexander Ker, a rateable share of the effects left by him. In bar of this action, it was

Pleaded: A person to whom an office of trust is given by the judicial act of a particular court of law, is not obliged to render an account of his administration in any other. Least of all can he be compelled to defend himself against those suits that may be instituted in another country, where the nature of his office, and the rights resulting from it, cannot be understood or explained. This is exemplified in the case of a factor named by the Court of Session, who cannot be required to account but in that Court, and who surely could not be sued in England, if he should happen to be found there.

In the case of an English administrator, who is merely the officer appointed in the proper court for managing the moveable estate of a person deceased, this rule seems peculiarly applicable. In taking out letters of administration, the party and his sureties become bound to produce, in the prerogative-court, a just inventory of the effects, which "are to be distributed and disposed of in such a manner and form as shall be limited by the direction of the Ordinary." This obligation, it is evident, cannot be fulfilled but in the same prerogative-court, from whence the letters of administration have issued; neither can the administrator, or his sureties, obtain a proper discharge elsewhere.

Thus the point has been repeatedly decided; and in the present case, where, owing to the peculiar construction of the will, it becomes a question, who are, by the law of England, intitled to the succession, to adopt a different rule would be exceedingly inexpedient. It may be said, that the administrator being dead, while those who have succeeded to her reside in Scotland, no effectual action could be instituted in the English courts. But as the defender is ready to appear in any action that may be brought against him in England, and as he is possessed of sufficient funds in that country, that circumstance does not seem to be of any importance. *Harcus, voce Executry*; March 1684, *Dryden contra Elliott*; 11th July 1754, *Burroughs contra Grant*; 22d November 1770, *Blackstocks contra Mackay*.

Answered: It is a mistake to imagine, that an English administrator can only be sued in the prerogative-courts. His authority indeed is derived from thence, as that of a Scots executor is from the Commissaries;

Commissaries; but this does not hinder him, any more than it does a Scots executor, from being sued in any of those judicatories where an ordinary action of debt could be brought against him.

If, after taking possession of the whole effects, a Scots executor were to retire to England, justice requires that the obligations he has come under to the creditors and nearest relations of the deceased should accompany him. In the same manner, where an English administrator brings the effects to Scotland, those for whom he is trustee, must have a power of suing him here. Indeed it is more necessary in the latter case than in the former, there being no method in the law of England, by which an action can be instituted against a party who is not within the kingdom.

The decisions which have been resorted to must have been founded on specialties which do not here occur; or if they rest on a broader foundation, they are manifestly erroneous. As to the ambiguity of the words used by the testator, that can prove no obstacle to the interposition of the Scots courts, if they be not wholly incompetent, the judges in this country being in the daily use of deciding on the principles of a foreign law, where it is necessary for doing justice to the parties.

Several of the Judges, moved by the former decisions, were at first for dismissing the action. But the judgement of the Court sustaining the jurisdiction, was at length pronounced with considerable unanimity.

The Lords sustained the action.

Reporter, *Lord Alva*.
Clerk, *Gordon*.

A&T. *J. W. Murray*.

Alt. Solicitor-General, *Frazer-Tytler*.

C.

N^o CXXII.

February 25. 1790.

The Honourable HENRY ERSKINE,

A G A I N S T

The Honourable JOHN HOPE.

MEMBER OF PARLIAMENT.—*Proof of the valued rent, by long use of paying the land-tax, where no decree of division appears.*

IN the original valuation of the county of Linlithgow in the year 1667, as well as in the subsequent one in 1687, the whole lands of Little Blackburn were rated at L. 366, 13s. But after this, for much more than forty years, that parcel of those lands called “Napier’s part of Little Blackburn,” was separately entered in the books kept by the collector of the land-tax, being rated at L. 210, 11s. 4d.; and the tenants of the lands paid a corresponding share of the public burdens.

It also appeared, that in the county of Linlithgow, till a very late period, the more formal method of dividing a *cumulo* valuation by a decree of the commissioners of supply, proceeding on a proof of the real rent, and engrossed in their minutes, had seldom or never been thought of. The whole minutes of the commissioners from the year 1687 were extant; but no traces could be found of a regular division of the valued rent of the lands of Little Blackburn.

Mr Erskine having acquired the superiority of Napier’s part of Little Blackburn, produced to the freeholders of the county, at the Michaelmas meeting in 1789, a certificate from two commissioners and the clerk of supply, bearing, that these lands were rated at L. 210, 11s. 4d.

Mr Hope, a freeholder in the county, objected to this evidence, and

Pleaded: Where a proprietor cannot shew that he is entitled to vote in consequence of the old extent of his lands, he must have recourse to the original valuations made up in every county by the commissioners of supply; or where the lands belonging to him have at first been valued *in cumulo* along with others, he must ascertain the separate valuation of his property by a regular decret of division pronounced by a *quorum* of the commissioners, in whom alone is vested the power of proportioning the land-tax among the different Crown-vassals.

vassals. Bankton, b. 4. tit. 9. § 3.; Wight on Elections, p. 183. 184. 197. 200.

In the proceedings too before the commissioners of supply, the payment of the land-tax, however uniform, cannot be considered as an unerring rule. This may have arisen from some erroneous calculation, from the wish of a particular proprietor to magnify the valued rent of his lands for political purposes, or from other causes. And although, where the records of the commissioners of supply cannot be found, it may have been thought just, to hold the payment of the land-tax as sufficient evidence of the valued rent, because it may in such a case be presumed that it was authorised by a decree of division; the same determination here would be quite unjustifiable. 1768, Hogg of Newliston *contra* the Freeholders of Linlithgowshire; 10th March 1774, Ross *contra* Sir Roderick Mackenzie; 1776, Nilbet of Dirleton *contra* Lindsay.

Answered: Neither by the enactment of 1681, nor by any of those which followed respecting freehold-claims, has any particular kind of evidence been required for ascertaining the valued rent of lands giving a right to vote. It is sufficient, that the claimant shall be publicly infest "in lands liable in public burdens for his Majesty's supplies for L. 400 of valued rent."

While the practice of splitting estates in order to create freehold-qualifications was unknown, very little attention was paid to this circumstance. Even when the commissioners of supply proceeded in a formal manner to distinguish the separate values of those lands which had been originally included in one *cumulo*, this was rarely entered in the record. After the division was made, it was thought sufficient, if the collector of supply inserted the separate values of each parcel in the books kept by him. And hence, in the county of Linlithgow, as well as in many others, it has often happened, that where there is the strongest reason for believing that a decree of division has been pronounced, no traces of it are to be found in the books kept by the commissioners of supply.

For these reasons, a distinction has been justly made between those cases where the land-tax has till lately been paid by the vassals of the Crown under a *cumulo* valuation, and those in which, from a very remote period, it has been paid separately for different tenements, even altho' these may appear under one general article in the original books of valuation. In the former, in order to ascertain the valued rent of each tenement, a regular decree of division by the commissioners of supply may, with propriety, be required; whereas, in the latter, it being reasonable to presume that a proper division has taken place, the terms of the decree may be ascertained by the uniform payment of the land-tax, this being the standard which, if no objection is stated by those more immediately interested, the commissioners of supply, in pronouncing any new decree, would certainly adopt as the rule of their proceedings. A contrary practice, in circumstances similar to the present, would be productive of much unnecessary embarrassment. Act,

1681, Kames's Select Decisions, N^o 49. 10th February 1781, Traill of Holland *contra* Haldane; Wight on Elections, p. 183.

The freeholders having refused to sustain the evidence here founded on by Mr Erskine, he preferred a complaint to the Court of Session, which was followed with answers, replies, and duplies.

"The Lords found, that the freeholders had done wrong, and ordered Mr Erskine to be admitted to the roll."

A^t. Robertson, Cathcart, et alii.

Alt. Lord Advocate, Williamson, et alii.

Clerk, Gordon.

C.

N^o CXXIII.

March 2. 1790.

J A M E S B A I L L I E,

A G A I N S T

J A M E S D O I G.

PRESCRIPTION.—EXECUTION.—*A summons executed without subscribing witnesses, insufficient for interrupting the sexennial prescription of bills of exchange.*

DOIG sued BAILLIE in the Sheriff-court of Forfar for the contents of a bill of exchange dated in 1769. The summons was issued on 13th May 1778, and a citation was given on the following day, when the six years from 15th May 1772 had not elapsed.

But the execution of the summons was not witnessed in terms of the act 1686, c. 4.; and it appeared, that in ordinary actions of debt this was never done in that Court. The summons was afterwards called in Court on 16th June 1778, but no appearance was made for the defender.

On this footing matters stood for many years, when an action being brought by Baillie against Doig, the bill of exchange already mentioned was stated in the way of compensation as the document of

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a subsisting debt. The Sheriff-depute having pronounced a judgment in favour of Doig, Baillie, in a bill of advocation,

Pleaded: By act 1686, cap. 4. it is declared, that all citations shall be subscribed by witnesses, otherwise to be null and void. If this law is to be enforced where the party cited, by appearing in Court, seems to have been sufficiently put on his guard, it ought to be observed with all possible rigour, when, no appearance having been made, the legal presumption of want of due notification, arising from the omission of the requisite formalities, is confirmed. In those cases especially, where the question is, whether or not a statutory limitation has taken place, the temptation to a false execution being there greater than in any other, it would be highly inexpedient to depart from the general rule. Indeed, if we compare the enactment in 1686 with the preceding one in 1681, c. 5. requiring the subscription of witnesses in the execution of summonses for interrupting prescription of real rights, it seems hardly possible to dispute, that the same strictness with which the one statute has been followed ought to be observed with regard to the other. If so, the erroneous practice of a particular district ought not to be admitted to sanction a deviation from the established law.

Besides, it is somewhat doubtful how far the execution of a summons in the most regular manner, is sufficient for keeping alive a claim, otherwise falling under the sexennial limitation introduced by the statute of 1772, which requires, "that diligence shall be raised, or *action commenced*, within the six years;" by which last it must have been meant, that besides the execution of the summons, some farther proceedings should, within the six years, be held by the judge before whom the action is brought. Bankton, b. 2. tit. 12. § 67.

Answered: The object of the statutory limitations being to prevent those claims which might have been obviated if they had been intimated at an earlier period, it seems to follow, that where such intimation has been actually, though perhaps somewhat informally made, no objection should be listened to. This idea is confirmed by many decisions, and it seems peculiarly applicable to such a case as this, where notice was given according to the established usage of the Court in which the action was commenced. The opinion of our lawyers with regard to the enactment of 1681, which was meant for securing the uninterrupted commerce of landed property, cannot here be of any weight.

The argument founded on the words of the statute in 1772, is evidently erroneous. By the execution of the summons within the six years, the defender being warned of the danger which might arise from not preserving the necessary documents, the purpose of the law seems to be fully complied with. It has been uniformly held too that an action is commenced as soon as the summons is executed. Stair, b. 4. tit. 3. § 20.; Bankton, b. 2. tit. 3. § 14.; Erskine, b. 2. tit. 11. § 3.; b. 3. tit. 6. § 3.; Dictionary, *voce* Litigious, 25th No-

vember 1665, White; 6th July 1671, Macra; 9th January 1700, Abernethy; 13th July 1761, Cameron.

The Lord Ordinary sustained the claim arising from the bill of exchange. And after advising a reclaiming petition for James Baillie, with answers for James Doig,

The Lords adhered to the judgement of the Lord Ordinary.

But a reclaiming petition having been preferred, which was followed with answers,

The Lords altered the former interlocutors, and found, that the execution of the summons at the instance of James Doig not having been authenticated by the subscription of witnesses, was not sufficient for interrupting the sexennial prescription of bills of exchange.

Lord Ordinary, Stonefield.

A. Robertson-Scott.

Ait. Gillies.

Clerk, Home.

C.

N^o CXXIV.

March 3. 1790.

EBENEZER GARDNER,

AGAINST

THOMAS HALL.

LEGAL DILIGENCE.—*A pardon having been granted to a criminal sentenced to transportation, on condition of his enacting himself to banishment after being set at liberty, personal diligence at the instance of creditors not thereby precluded.*

HALL being convicted, before the High Court of Justiciary, of the crime of *swindling*, sentence of transportation was passed against him. The punishment however was afterwards remitted, he having obtained a pardon from the Crown, “under the condition of his enacting himself to banishment from his Majesty’s European dominions,

“dominions, within twenty days from his being set at liberty, for the term of seven years.”

Having been, prior to his conviction, arrested in prison by his creditors, he now presented a bill of suspension and liberation, and

Pleaded: It is obvious that the claims of a private creditor must ever yield to public justice, when it inflicts punishment on the debtor. If he be possessed of a lucrative life-estate, his death will not be prevented, though a certain loss result from it to his creditors. Nor is the transportation of a felon to be impeded by his creditors arresting him in prison.

Such is truly the situation of the complainer. Though he has received the royal pardon, his punishment is not completely remitted, but only commuted; sentence of transportation being changed into his engaging himself to banishment, in the same manner as transportation is often substituted for capital punishments. He is therefore to be viewed in the same light as if the latter had been the original sentence.

In England many similar cases have occurred, and the same rules must in this matter prevail in both kingdoms. Thus a pardon being granted to a felon on condition of his going beyond seas within a time prefixed, his creditors moved the Court of King's-Bench for leave “to charge him with civil actions;” but the motion was denied, because it would defeat the effect of the pardon, by rendering the party incapable of accepting the condition of going beyond seas. Raymond, vol. 2. p. 848. See also p. 1572.

Answered: By a pardon, every effect of the condemnatory sentence being done away, the party, both in respect of his rights, and of the obligations he had come under, is restored to his former situation. Bacon's Abridgement, *voce* Pardon, vol. 3. p. 809. A pardon, it is evident, may be conditional as well as absolute, and, in the present instance, a condition has been annexed; but that condition is not to be considered as a substituted punishment. The power of sentencing to punishment belongs not to the King; nor would it be more lawful when inflicted in the way of commutation, than if it had been decreed in the first instance. Yet the contrary must be supposed, before one mode of punishing by banishment can be understood to have been substituted for another.

The complainer's person then may be attached at the instance of his creditors; in the same way as, if in the interval between being set at liberty and going into banishment he had contracted other debts, he would have become liable to diligence on that account: Of which there can be no more doubt, than that, if in the same interval he had committed a new crime, he would have subjected himself to a new punishment.

It is granted, that he is not to be deprived of the benefit of his pardon; but he ought nevertheless to enjoy it consistently with the rights of other parties. Bankton, b. 3. tit. 3. § 84.; Erskine, b. 4. tit. 4. § 105. The condition of the pardon is only to take place after

after "he is set at liberty;" and this again ought not to happen, until his creditors shall have been allowed to employ the legal means of compelling him to do justice to them, which it is not to be supposed that the Sovereign intended to obstruct. Their proceedings, therefore, will not create any forfeiture of the pardon; and thus the present case is distinguished from that mentioned above, where the condition of the pardon was limited to a certain day, the time being prefixed.

The Lord Ordinary on the bills reported the cause, when the Court appointed memorials; on advising which they were of opinion, that the plea of the complainer should be repelled, and the bill refused.

Reporter, *Lord Stonefield.*

For the Suspender, *Hamilton.*

Alt. *Cullen.*

S.

N^o CXXV.

March 4. 1790.

JOHN ANNAND,

AGAINST

JOHN ROSS.

BATTERY—PENDENTE LITE.—Act 1594, cap. 219. *Action on that statute sustained, so as to affect the creditors of a bankrupt party.*

ANNAND having sued Ross in an action of oppression and damages, the defender, while it was in dependence, meeting the pursuer, struck him several severe blows on the face. Upon this, Annand raised a process of battery *pendente lite*, concluding against Ross on the statute of 1594, that decree should be given according to the terms of the original libel.

The topics insisted on were in substance the same as were urged in the case of *Fowler contra Gillespie* *.

But Ross having become bankrupt, appearance was also made for his creditors, who stated, that they had a material interest in the question, as this penal statute, if found to be still in force, would

* *Vid. supra*, p. 114.

operate

operate against them, and deprive them of all fund of payment of their debts. If the statute is still in force, it ought at least to be limited to its own purpose, which was the punishment of the offending party; but it would be injustice to allow it to affect the rights of third parties, who have committed no offence.

In every competition among creditors, any individual creditor is intitled to scrutinize the grounds of the debts of all those who compete with him, and by whose preference his own fund of payment may be diminished. In the present case, the creditors consider themselves as intitled to examine and canvass the grounds of the original action, in which if the pursuer prevail, their fund of payment is diminished; in the same manner as they would be intitled to object to the constitution of any debt of a competing creditor.

It is no sufficient answer to them, that by the operation of a certain penal statute, this debt is constituted against the common debtor. They have no concern with that penal statute, whose operation must be confined to the offender himself. The law might have judged it expedient to punish masterful oppression, by decreeing that the oppressor should lose his suit; but it could never judge it expedient, that in a competition of creditors, false debts should be sustained to the prejudice of true; or, what is the same thing, that no investigation should be allowed whether the debts are true or false.

The Court, however, allowed a proof of the battery.

A& M. Refs.

Alt. Fraser-Tytler.

N^o CXXVI.

March 10. 1790.

Sir WILLIAM DUNBAR, Baronet, and others,

A G A I N S T

GEORGE SUTHERLAND.

MEMBER OF PARLIAMENT.—Act 16. Geo. II. cap. 11. *An instrument of feisin not marked in the minute-book, nor engrossed in the record till within twelve months of the inrolment, sustained.*

GEORGE SUTHERLAND claimed inrolment as a freeholder in the county of Caithness at the Michaelmas meeting held on 30th September 1789.

In support of his claim, Mr Sutherland produced among other writings, an instrument of feisin, with an attestation on the back of it by the keeper of the record in the county, bearing, that it had been presented on 29th September 1788, and recorded on the same day. Mr Sutherland was accordingly inrolled.

It was afterwards discovered, that the instrument of feisin had not been engrossed in the register for several days after 29th September 1789, and that it could not be marked in the minute-book directed to be kept by 1693, cap. 14. no such book being kept in the county of Caithness. In a complaint, therefore, founded on the circumstances already mentioned, Sir William Dunbar and others, freeholders in the county,

Pleaded: By act 16th Geo. II. cap. 11. it is provided, That “no purchaser or singular successor shall be inrolled till he be publicly infest, and his feisin registered, or charter of confirmation expedite, where a confirmation is necessary, one year before inrolment.” Thus, the recording in this instance not having been performed for a full year before inrolment, the judgement of the freeholders was manifestly erroneous, and ought to be set aside.

The statute of 1617, cap. 16. evidently required, that the feisin or other writing should be actually transcribed into the record, the attestation on the back being only intended to establish the claim of reparation against the keeper of the record, if the business of registration was not conducted with sufficient accuracy. This was the opinion of Lord Stair, who justly observes, that no purchaser could be secure if a different rule were to be adopted. And even although this might have admitted of a doubt, especially after the enactment of

of 1686, cap. 19. the subsequent statute in 1696, c. 13. has declared, in the most express terms, that "no feisin, or other writ or diligence appointed to be registrate, shall be of any force or effect against any but the granters, unless it be duly booked and insert in the registers; Stair, b. 2. tit. 3. § 21.

It is true, that where a feisin has been regularly presented to the keeper of the records, and by him duly entered in the minute-book as required by 1693, cap. 14. a claim of inrolment founded on it has been sustained, although some delay has occurred in transcribing it into the record. As this minute-book, which is open to public inspection, contains a general description of the lands, and as the instrument of feisin or other document is retained in the hands of the keeper of the record till it is engrossed *ad longum*, such a determination can be attended with little loss. Great care however must be taken, that by a gradual infringement of the general rule, the public security provided for by the records may not suffer a fatal injury. If a feisin were to be sustained, though not marked in the minute-book, nor to be found in the record, no singular successor could be safe; and persons might be admitted to the privilege of voting, who have no real interest in the welfare of the community, although, in order to prevent such undue inrolments, a previous publication of the infeftment for so long a period has been made necessary.

Answered: General laws cannot be framed in such a manner, as to be precisely applicable to the circumstances of every case. It is therefore the province of courts of justice so to construe these enactments, as to adapt them to common use. Where such a construction has been given, by the usage of the country, and especially where it cannot be attended with any loss, this rule appears to be highly expedient and just. In giving effect to the statutes respecting registrations, it has been often followed. By the enactment of 1617, it is required, that the feisin or other writing should be engrossed within forty-eight hours after it is presented to the keeper of the register; yet, as in the case of many feisins being given in at the same time, this cannot be done, it has been held sufficient if the presentation of it has been duly notified in the minute-book. So likewise in the case where it has been certified in the minute-book, that the writing was recorded on a certain day, it is not allowed to prove that the booking took place at some after period; this being agreeable to the common practice, and attended with no inconveniency, as the keeper of the register retains in his possession the feisin or other writing, for the information of those who may wish in the mean time to examine the record. In the same manner, in a case where no minute-book has been kept, it must be enough to show, that the feisin was duly presented for publication, as is done by the attestation on the back of the writing itself, and that the deed continued in the hands of the public officer until it was regularly engrossed; Wight on Elections, 4to edit. p. 221.

The

The Court were much divided in opinion, and the question was at length determined by a very narrow majority.

After advising the petition and complaint, with answers and replies,

“ The Lords dismissed the complaint.”

Ast. Horyman, Tait, et alii.

Alt. Dean of Faculty, et alii.

Clerk, Mitchelson.

C.

N^o CXXVII.

May 15. 1790.

L O R D E L P H I N S T O N E,

A G A I N S T

A L E X A N D E R K E I T H Senior and Junior.

ANNUALRENT.—FACTOR.—*What interest due by a factor upon the money in his custody.*

M^{ESS.} KEITH had long been the confidential agents of the late Earl Marischal. At different times they had rendered an account of their management, without making any demand for their personal services. On the other hand, although considerable sums of money had been allowed to remain in their possession, they were not required to pay interest.

Earl Marischal died on 28th May 1778, after having made a settlement in favour of Lord Elphinstone. Some difficulties however occurred with regard to the effect of it; and it was not till the year 1780, that they were entirely removed. In 1788, an action having been brought by Lord Elphinstone against Mess. Keith, for the payment of certain sums lodged in their hands by Earl Marischal; the defenders claimed a deduction on account of their services; and they also contended, that no interest could be demanded from them.

The

The Court considered the mutual obligations between the defenders and Earl Marischal to be sufficiently ascertained, by the manner in which the accounts had been settled between them; the advantage derived by the defenders from the temporary use of the money deposited with them, having been viewed as a proper recompence for their personal trouble.

The only difficulty arose with regard to the interest of the money left in the defenders possession at the time of Lord Marischal's death. In general it was held, that a factor was not obliged, immediately after the death of his constituent, to pay interest for the money in his hands. As soon, however, as it could be known in what manner it was to be disposed of, if he did not put it into one of the banking houses, it was thought just that he should be liable in the same rate of interest which might have been obtained for money so employed.

The Lord Ordinary found, "that the defenders were not liable for interest on the above-mentioned balance." But the Court altered that interlocutor, and

"Found the defenders liable in interest, at the rate of 4 *per cent.* on the money in their hands at Lord Marischal's death, from 28th May 1779, being a year subsequent to the death of Lord Marischal."

Ordinary, *Lord Alva.* *Act. Dean of Faculty, Abercromby.* *Alt. C. Hay.* *Clerk, Sinclair.*

C.

N^o CXXVIII.

May 15. 1790.

JOSEPH WILLIAMSON,

A G A I N S T

JOHN SMITH.

MEMBER OF PARLIAMENT.—*A complaint to the Court of Session respecting inrolment, must be served against all those who offered objections in the freeholders court. Nominal and fictitious.*

MR WILLIAMSON was inrolled among the freeholders in the county of Perth, as proprietor of the lands of Dungarthill. These lands in 1788 he sold to the Duke of Athol.

Before the bargain was concluded, it was proposed by Mr Williamson that he should retain his freehold-qualification; but the conveyance made out in favour of the Duke on 7th February 1789, containing procuratory of resignation and precept of feisin, was absolute and unconditional. After the Duke had taken a base infeftment, he granted to Mr Williamson, on 11th August 1789, an obligation not to take a charter of confirmation from the Crown, nor to execute the procuratory of resignation during Mr Williamson's life. This obligation, to which a penalty of L. 10 Sterling was annexed, was immediately inserted in the register of feisins.

At the Michaelmas meeting in October 1789, an objection arising from the above transaction was stated to Mr Williamson's remaining on the roll, by Mr Smith and two other freeholders; and the objection being sustained, Mr Williamson complained to the Court of Session; but the complaint was directed against Mr Smith alone. In defence, it was

Pleaded: By the statute 16th of his late Majesty, which regulates the method of proceeding in questions respecting freehold-claims, it is provided, that the Court of Session may grant a warrant for summoning "the person or persons," upon whose objection a freeholder has been struck off the roll. The present complaint must therefore fall to the ground; only one of the three freeholders by whom objections were offered having been made a party to it.

Farther, the judgement of the freeholders was evidently well founded. After the conveyance in favour of the Duke of Athol, the right of the granter became altogether nominal; what is reserved being neither a *lifereit* nor a *fee*, but a mere tolerance to vote as a freeholder, and this defeasible at any time on payment of L. 10 Sterling.

Sterling. Such an agreement seems to be wholly incompatible with the genius of our political law; 13th February 1745, Gibson.

Answered: The argument arising from the method of giving notice of the complaint, is far too critical, and ought not to be listened to for setting aside a legal right to vote. Nor is the objection to the qualification itself better founded. When the complainer was enrolled, his title was unexceptionable; and although it was at one time in the power of the purchaser from him to put an end to it, the agreement, which was afterwards made, brought back matters into their former situation. In several recent cases, proceedings of the same kind have been sanctioned by the Court; and however insignificant, in a pecuniary view, the reserved right may be, it involves the privilege of voting, when held under no confidential tie, as much as the most valuable estate holding of the Crown; 5th March 1755, Nielson; 7th March 1781, Russel *contra* Fergusson; 20th February 1787, Macdowal *contra* Crawford.

The judgement of the Court proceeded on the preliminary objection. Several of the Judges, however, expressed their opinion, that the complainer had no right to remain on the freeholders roll.

After advising the complaint, which was followed with answers and replies,

The Lords dismissed the complaint.

Ast. *Macnechie.*

Alt. *C. Hay.*

Clerk, *Menzies.*

C.

N^o CXXIX.

May 16. 1790.

ALEXANDER MURRAY,

A G A I N S T

ALEXANDER MUIR-MACKENZIE.

MEMBER OF PARLIAMENT.—*A claim for inrolment by a liferenter ought to specify the nature of his right.*

IN the claim exhibited for Mr Murray, in order to his being inrolled among the freeholders in the county of Perth, it was stated, that “ he was publicly infeft in all and whole the half of all and “ whole the lands of Ruskie, with the manor-place thereof,” &c.

The dates of a Crown-charter in which these lands were granted to Lord Napier, of the assignation by his Lordship in favour of Mr Murray, of the infeftment which followed, and of its registration, were accurately mentioned ; the valuation of the lands was also precisely stated.

Instead of having right to the property or superiority of the lands, Mr Murray was merely a liferenter of the superiority, the fee belonging to his brother. The freeholders therefore refused to inrol him. And a complaint being preferred to the Court of Session, Mr Muir-Mackenzie, by whom the objection had been made,

Pleaded : By the enactment 16th of his late Majesty, it was provided, “ That, in order to prevent surprise at the Michaelmas meetings, “ every freeholder who intends to claim at any subsequent Michaelmas meeting of the freeholders, shall, for the space of two calendar months at least before the said Michaelmas meeting, leave with “ the Sheriff or Stewart clerk a copy of his claim, setting forth the “ names of his lands, and his titles thereto, with the dates thereof, “ with the old extent or valuation upon which he desires to be inrolled ; and in case of his neglect to leave his claim as aforesaid, he “ shall not be inrolled at such Michaelmas meeting.”

A claimant cannot be thought to comply with this regulation, by merely stating the names of his lands, and the dates of the writings to be produced by him, leaving the freeholders from thence to discover the nature of his qualification, and the peculiar character in which he has a title to be inrolled. Least of all can it be thought, that a description of titles quite inconsistent with the true nature of his right, is to be admitted. Here then the claim preferred for the complainer

plainer, was wholly incompatible with the purpose of the law, the statement exhibited by him having, as it would seem, been purposely so framed, as to give the freeholders a more favourable opinion of his qualification than it truly deserved. This reasoning is supported by a decision 3d March 1773, Abernethy of Mayen.

Answered: The statute requires a specification of the names of the lands, the titles of the claimant, the dates of those titles, and, lastly, the old extent or valuation. The claim here given in was therefore precisely agreeable to the directions of the law. It is no where said, that the nature of the estate, whether as a liferent or fee, a wadset, a right of apparenry, or of courtesy, should be accurately defined. Nor is this at all necessary, as it must be presumed that the freeholders, after the enumeration already mentioned, will be fully able, by inspecting the public records, to prepare themselves for giving a determination.

The former precedents, so far from enlarging the operation of this law, which is of a correctory nature, have tended to restrain it within the narrowest bounds. Thus it was found, that an omission to mention the date of a retour was not fatal to a claim for inrolment. And in the same manner, where the date of one charter had been erroneously stated, while that of another was wholly omitted, the claim was nevertheless sustained. In the present case, it was easy, from the writings specified in the claim, to discover that the claimant's right was a liferent, though as free from the challenge of nominality as any right of the same nature can be. The case referred to on the other side was very different from the present one, both the dates of the titles and the names of the lands having been omitted; Wight on Elections, 4to edit. p. 151.

A feeble attempt was made to shew that Mr Murray's qualification was nominal and fictitious. But the judgement of the Court proceeded on the defect of the claim exhibited for him, which did not appear to fulfil, in any reasonable manner, the purposes of the statute.

After advising the complaint, with answers and replies,

“ The Lords dismissed the complaint.”

A reclaiming petition was afterwards preferred, and followed with answers, but the Court adhered.

Aff. Rolland, Macleod-Bannatyne.

Alt. C. Hay.

Clerk, Sinclair.

C.

N° CXXX.

May 22. 1790.

MALCOLM MACFARLANE,

AGAINST

JAMES GRIEVE.

WRIT.—Act 1681, cap. 5. *The acknowledgement of subscription, not sufficient to supply the want of any of the statutory solemnities of deeds.*

MACFARLANE granted a lease to Grieve. Before possession had followed, however, the former instituted a reduction of it on this ground, that it had been omitted to insert in the deed the name and designation of the writer, a requisite, it was said, essential to its validity by the statute of 1681. The defender

Pleaded: That statute, it is true, has enacted, “that all such writs wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses.” But though the term *nullity* does in our statute-law sometimes import an intrinsic nullity, yet generally by that word nothing more is meant, than a circumstance affording an exception or reason of reduction. Thus, deeds null according to the terms of the acts 1621 and 1696, are yet never set aside without a formal process. In like manner, with respect to entails, many contraventions are expressly declared by the statute of 1685 to infer an *ipso facto* forfeiture, but in order to give effect to them, a *declarator* is required.

If such were not the case, it would be *pars judicis* to advert to objections of this kind, and no decree in absence where they occurred would be of any avail; whereas in truth suspension is not less necessary there, than in regard to other decrees. Nor would a deed null in any other sense be capable of homologation, which, however, those defective in the statutory formalities in particular have ever been found to be; Nicolson, (Annualrent), 20th November 1627; Leckie, Haddington, 7th March 1612; Boswell *contra* Kinninmount; Fountainhall, 23d November 1699, Grierson and Mackie *contra* Scott; Sinclair *contra* Sinclair, 17th February 1715.

When the statutes, therefore, relative to the formalities of writings employ the same expression, their purpose is to denote an exception or ground of reduction, which of course the party may either voluntarily pass from, or be debarred from pleading. But surely there

there can be no stronger bar to such an exception, than the acknowledgement of subscription; which occurs in the present case, nothing being here objected to, but the mere omission above mentioned.

The primary end of all the statutes on this subject is the preventing of forgery. As the ancient mode of authenticating writings by the seal merely of the party, was found to give frequent occasion to fraud, the additional requisite of subscription was introduced by the earliest of those statutes, 1540, cap. 107. In like manner, because "falsities increased daily within the realm," by reason of "the books of contracts" being written by persons "not commonly known," that of 1593, cap. 175. enjoined, that the name and designation of the writer should be mentioned in the deed.

Nor when the act 1681 declared the omission of this and other requisites "to be not suppliable by a condescendence," was the spirit of that enactment different. From the consideration of the lubricity of human testimony, that mode of supplying the defects of writings was thus precluded; but the special exclusion of it, cannot surely imply that all other means are rejected. It rather indeed imports the contrary. And of all means of ascertaining the verity of deeds, the most complete and satisfactory is evidently the acknowledgement of subscription.

Holograph writings are not excepted *verbatim* in any of the statutes; but if they are held to be so by implication, because of the little probability of falsehood in such cases, *a fortiori* ought those writings which are acknowledged to be true, and where there is no possibility of falsehood.

If it be supposed, that the statutory requisites in the form of deeds were in general also intended for the purpose of solemnity, this end, it must be owned, was sufficiently attained by the presence and the subscription of the witnesses. But in fact, as the presence of the writer is not required at the execution, the sole object of that particular circumstance must have been to guard against falsehood.

In conformity to these observations, many decisions have been pronounced. Thus where a contract was null in the sense of the statute of 1681, as bearing the subscription of one witness only, the defect has been found to be suppliable, by referring the verity of the subscription to the party's oath; Fountainhall, 26th December 1695, Beattie *contra* Lambie. And in each of the following cases, the grounds of the defender's plea have been recognised. Haddington, 22d June 1611; Redpath *contra* Huntly, 29th November 1609; Weir *contra* Moffat; Durie, 8th July 1623, Sheriff of Cavers *contra* Henderson; 16th January 1739, Crawford *contra* Wight; 4th July 1739, Crosbie *contra* Shiells; 18th December 1739, Campbell *contra* Lennox; 5th June 1742, Campbell *contra* Maclauchlan; 23d November 1742, Duke of Douglas *contra* Littlegill; 20th December 1746, Foggo *contra* Milliken; 8th June 1748, Neil *contra* Andrew; 17th June 1748, Rutherford *contra* Feuers of Bowden; 5th December 1765, Henderson *contra* Murray; 19th January 1779, Clark *contra* Ross. See also Bankton, b. 1. tit. 11. § 47.; Erskine, b. 3. tit. 3. § 47.

Answered:

Answered : It is for the purpose of solemnity, as well as of proof, that formal writings are required by law. In particular, "*solemnity in writ*" is essential to the perfection, of dispositions to heritable "rights, and of tacks," Stair, b. 1. tit. 10. § 9. But a null or informal writing never can produce such solemnity. The end to be attained by that prescribed formality, is to promote due reflection and deliberation in transactions of importance. An informal deed rather denotes carelessness and want of attention.

Such a null writing cannot even be rendered probative. In particular, it cannot, by the acknowledgement of subscription. Whenever recourse is had to this, or, which is the same thing, to oath of party, it must be received as subject to every intrinsic quality; such as that of force, of fear, or of ignorance of the contents of the writing. Since the import of it may be thus quite contrary to that of the writing, it is the oath alone that is probative, and not the writing, as thereby rendered such. Besides, informal writings are by express statute declared "to make no faith," an enactment which is not to be repealed by any acknowledgement of a party.

By the same rule, in every case where the law requires writing for an essential solemnity, as in that of seisin for example, it might with equal reason be said, that since writing is only a solemnity intended for proof of deliberate consent, it should always be superseded by the superior evidence of the party's oath.

The nullity of a deed therefore remains after the acknowledgement of subscription; and it is a mistake to suppose that it has no other operation than by affording an exception, which is debarred by such acknowledgement.

It is to be remarked too, as the reason why it is not *pars judicis* to refuse action on a null writing, when the objection is not made by the defender, that every writing, whether valid or null, implies a verbal contract, which, though the subject of it be land, is always, while acquiesced in, a good ground of action; as the want of writing affords only *locus pœnitentiæ*.

Nor is it of more importance in this argument, that homologation has been found to supply the defects of a null deed. This does not happen by imparting perfection to the writing, which continues void as before; but it is the act of homologation itself that establishes the contract, being a renewed expression of consent in the strongest manner *rebus et factis*, which will bind parties, when neither a verbal contract nor an informal deed would. A verbal contract concerning heritage may be refiled from; but acts of homologation, and *rei interventus*, render the contract equally binding as if it had been expressed by the most regular deed.

The decisions of the Court are extremely uniform, in respect to the principle, that a deed defective in solemnity cannot be supported by the acknowledgement of subscription. Even prior to 1681 this was found; Durie, 14th February 1633, Ranken *contra* Williamton; Durie, Spottiswood, 11th February 1634, Cassimbro *contra* Irvine. But the subsequent decisions to the same effect are of more importance. Harc. N^o 207. January 1686, Gordon *contra* Macpherson; Fountainhall, November

November 1698, Campbell *contra* Robertson; Ibid. 21st November 1704, Kirkpatrick *contra* Ferguson; 15th July 1707, Abercromby *contra* Innes; Forbes, 4th February 1710, Logie *contra* Ferguson; Ibid. 3d July 1711, Short *contra* Hopekin; Ibid. 22d December 1710; Fountainhall, 22d December 1711, Gordon *contra* Macintosh; Edgar, 4th February 1725, Children of Campbell *contra* Campbell; Dict. vol. 2. p. 546. Strachan *contra* Farquharson, 22d February 1728; Ibid. vol. 1. p. 124. Innes *contra* Commissioners of Supply, 8th February 1728; Ibid. vol. 2. p. 542. Home *contra* Dickson, June 1730; Ibid. p. 539. Davidson *contra* Charteris, 12th December 1738; Kilkerran, p. 255. 20th July 1744, Liddle *contra* Creditors of Dick; Fac. Coll. 30th June 1758, Ferguson *contra* Macpherson; Ibid. 2d February 1761, Young *contra* Ritchie; Creditors of Young *contra* Little in 1763; Mackenzie *contra* Lawson, 15th November 1764; Ersk. Instit. p. 427.; Bisset *contra* Stewart in 1765, Ibid.; Fac. Coll. 17th December 1766, Russell *contra* Paisley and Little; Ibid. 6th July 1768, Sheddan *contra* Spruel Crawford; Wallace, 21st July 1772, Crichton and Daw *contra* Sym; Fac. Coll. 4th July 1781, Grierson *contra* King; Ibid. 25th November 1782, Wallace *contra* Wallace; 9th December 1785, Walker *contra* Duncan; 23d June 1786, Edmonston *contra* Lang.

The Lord Ordinary pronounced this interlocutor: "In respect of the decisions of the Court, and on that account alone, finds the tack libelled void and null, and reduces," &c.

A reclaiming petition having been presented, and answers given in, a hearing in presence took place by appointment of the Court.

Several of the Judges thought, that the statute, by debarring condescendences in particular, did not mean to preclude the more certain test of the verity of deeds by acknowledgement or oath of party. The case of holograph writings, it was argued, shews this; as these, notwithstanding the statute, are valid without witnesses, their verity being otherwise ascertained, although not near so completely as by such acknowledgement.

It was likewise observed: Though writing be *de essentia* of deeds respecting land-property, yet no part of the contents of the *testing clause* comes under that description. It is not comprehended in the *verba solennia* of writings; which is evinced by this, that the name of the inserter of that clause is not required to be mentioned. Its sole purpose is for authenticating deeds, by the naming and designing of the witnesses. It is therefore useless in those writings, to authenticate which witnesses are not necessary; such as holograph deeds, and, surely much more, deeds of which the subscription is acknowledged. And if the want of this clause altogether would have been of no consequence, a partial want, or a defect in it, cannot be supposed of more significance. Besides, the deeds spoken of in the statute as "not suppliable by a condescendence," were evidently those only in which the subscription of witnesses was required.

The Court however were unanimously of opinion, that in competitions of creditors effect ought never to be given to the acknowledgement of subscription, so as to affect any *jus quæsitum* arising from the informality of deeds. And

A majority considered, that no deeds whatever were probative, but those executed with all the formalities required by statute. Were the oath of party, it was observed, made to supply the want of the statutory requisites, the consequences would often be very unjust. Not only in general, with respect to all bargains to which writing is essential, the knave would be free and the honest man bound; but in the case of mutual contracts, when one of the parties happened to die, his heir might either be liberated, or hold the other party under the obligation at his pleasure; and in that of co-obligants, one of them surviving might be made liable for the whole debt, while his claim of relief against the other *correi* would by their death be cut off.

The Lords therefore adhered to the interlocutor of the Lord Ordinary, reducing the tack in question.

Lord Ordinary, *Dreghorn*.
Clerk, *Sinclair*.

A&C. *G. Fergusson, M. Refs.*

Alt. Solicitor-General, *Wilson*.

Similar decisions were given in several other cases determined at the same time.

S.

N^o CXXXI.

May 22. 1790.

HIS MAJESTY'S PRINTER and STATIONER,

AGAINST

Mess. BELL & BRADFUTE, and others.

DAMAGE AND INTEREST.—REGALIA.—*Monopoly to the King's Printer; how far his patent extends to Bibles having commentaries annexed.*

THE letters-patent conferring the office of King's Printer, bear, that he shall have *solum et unicum privilegium imprimendi in Scotia Biblia Sacra, Nova Testamenta, Psalmorum libros, et libros Precum Communium,*

munium, Confessiones Fidei, Majores et Minores Catechismos, in lingua Anglicana.

Upon that title a bill of suspension was presented to the Court, complaining of, and craving an interdict against the publication of several commentaries on the Bible, in respect that each of them contained a complete copy of the Bible itself; and in particular those of Henry and of Ostervald; the first of which is very voluminous, while the other is remarkable for its brevity.

Pleaded for the Complainer: Of the royal prerogative to grant this exclusive privilege there can be no doubt. It was in particular recognised by a judgement of the Court in 1717, in the case of Mr Watson, who was then the patentee; and in the late celebrated questions concerning the existence of literary property at common law, this exercise of prerogative was on all hands considered as indisputable.

By the publications in question the complainer's right is infringed. They contain the whole of the Bible from beginning to end; and though they also comprehend extraneous matter, in the form of annotations or commentaries, that does not vary the case with regard to the printing of the sacred text.

This patent is analogous to the act of Q. Anne, vesting authors with the copy-right of their works. But the law will not suffer that property to be violated, under the pretence, either of the addition of notes or observations on the original work, or of annexing it to other compositions; Fac. Coll. 25th June 1785, Murray *contra* Macfarquhar; 17th July 1787, Payne and Cadell *contra* Anderson and Robertson.

If the complainer would not be intitled to subjoin to the Bible as an accessory of it, those commentaries, if they were private property, the publishers of them surely should not be allowed to consider the Bible itself as an accessory of their annotations. It is evident, besides, that the patent would in this way be defeated by every thing which bore the appearance of a commentary. For how is a line of distinction to be drawn, in respect of magnitude and importance, between one commentary and another?

Answered: The power of granting monopolies is in England conferred on the Crown by statute 21st Jac. I. cap. 3. In Scotland, where that power was as little implied in the royal prerogative, as appears from act 1540, cap. 127. no such statute ever passed, except that of 1551, cap. 27. concerning the licensing of books; an arbitrary enactment, framed on purpose to repress a spirit of inquiry in the infancy of the reformation, and long ago in desuetude. The validity of exclusive privileges like that in question, is therefore at least doubtful; Bankton, b. 1. tit. 19. § 11.; Fountainhall, 5th January 1683, Anderson *contra* Lindsay; Edgar, 13th January 1725, Corporation of Girdlesmiths of Culrofs *contra* Watson and Masterton. As a strong indication of this, it is to be remarked, that though the patent now in question, beside Bibles, gives equally the sole privilege of publish-

ing New Testaments, Psalm-books, Confessions of Faith, and Books of Common Prayer; yet it is notorious, that all of these have been constantly published without challenge from the King's patentee.

But at any rate, such exclusive privileges ought always to suffer the strictest interpretation, as being unfavourable to the rights and liberties of the people at large; a rule which is exemplified in the encouragement given to those who, by adding any improvement to the subject of a patent, obtain the full benefit of the monopoly.

This patent it is plain does not concern commentaries on the Bible; and the only point in dispute is, whether the text may be published along with the commentary. But it is impossible to exhibit with convenience or propriety a commentary on any work, unless the text be subjoined; nor is there more than an instance or two in the Protestant countries, of any commentary on the Bible having been published separate from the text. As this monopoly then does not extend to commentaries on the Bible, they ought to be permitted to appear in that form and manner which are suited to their nature, and annexed or subjoined to the text which they are intended to illustrate.

It is no doubt true, that an appearance of a commentary may be assumed, for the unlawful purpose of evading an exclusive right of publication; but such a fallacy cannot escape detection. By that standard the present parties are willing to be tried.

The Lord Ordinary on the bills reported the cause upon memorials; when

The Court seemed to entertain no doubt, on the one hand, of the patentee's right to the sole printing of Bibles, nor, on the other, with respect to the liberty of publishing commentaries on the scriptures in conjunction with the sacred text. At the same time, it was thought necessary to guard against devices for evading that legal privilege. In this view a distinction was made between Henry's Commentary, where the annotations are about five times the bulk of the text, and the work of Ostervald, whose notes are so inconsiderable in quantity, that they might, without much difficulty, be employed as a subterfuge.

The Lords therefore refused the bill so far as it concerned Henry's Commentary, and allowed expences; but passed it with respect to that of Ostervald.

Reporter, *Lord Gardenston.*
Frazer-Tytler, Dickson.

For the Complainer, *Solicitor-General.*

Alt. *Rolland,*

S.

N^o CXXXII.

May 23. 1790.

ROBERT CARRICK,

A G A I N S T

HENRY-WILLIAM HARPER.

BILL OF EXCHANGE.—*Promissory notes. Intimation of dishonour by one indorser to another.*

HUMPHRY KER granted a promissory note for L. 217, 11 s. to Henry-William Harper, or order, payable in London three months after date.

This note Harper indorsed to Robert Carrick at Glasgow, who indorsed it to Walker, one of the agents or riders of Thomas Johnstone merchant in Manchester. By Walker it was indorsed to Johnstone his employer, from whom it came by another indorsation into the hands of Joseph Jones and Company in London.

On the last day of grace, the note was protested for non-payment by Joseph Jones and Company, and within three days after, the dishonour was intimated to Johnstone at Manchester. Walker, Johnstone's rider, being at this time from home, Johnstone, owing to his ignorance of the address of Carrick the preceding indorser, did not give any intimation till the 14th day after the date of the protest; a letter for Carrick being then put into the post-office. Carrick received this letter on the 19th day after the date of the protest, and he immediately gave notice to Harper, to whom the note had been originally granted.

The contents of the note having been paid by Johnstone to Joseph Jones and Company; and by Carrick to Johnstone, the question arose, whether Harper was obliged to relieve Carrick from the loss.

Pleaded for Harper: Viewing the promissory note in the light of a foreign bill of exchange, as all documents conceived in this form, and neither payable nor dated in Scotland, ought to be, it cannot now be the foundation of any legal claim, unless against the particular indorser to whom intimation of the dishonour was given within three posts after the date of the protest; Erskine, b. 3. tit. 2. § 33.; Fac. Coll. 14th February 1781, Elliot *contra* Bell.

Even considering the note as an inland bill of exchange, and regulated either by the English or Scots law, the same conclusion would seem to follow. By the former it is required, that in case of dishonour, "the protest shall, within *fourteen* days after the making

“ thereof, *be sent*, or otherwise due notice be given to the party “ from whom the bill was received.” By the latter, it is required “ that notice of the dishonour shall be *given* within fourteen days after the protest is taken.” Act 9th & 10th Will. III.; act 3d & 4th Anne; act, 12th Geo. III. cap. 72. made perpetual by act, 23d Geo. III. cap. 81.

It may perhaps be said, that these rules ought not to be applied to the case of indorsers claiming relief from one another. But even with regard to them, in a territory so limited as that of Britain, the space of fourteen days seems in general to be sufficient for the purpose of intimation; and although some latitude were to be allowed, a silence for so long a period as here intervened can admit of no excuse, unless it were to be held, that every indorser was to have a fortnight for intimating the dishonour to the party from whom he received the bill or promissory note. But such a construction of the law would be attended with the most pernicious consequences to trade.

Answered: The promissory note in question being dated and payable in London, is to be regulated by the law of England. Indeed since the late enactments in 1772 and 1783, prescribing the mode of negotiation to be observed in Scotland with regard to inland bills of exchange and promissory notes, there is no material difference between the laws of the two countries. In both, it is incumbent on the holder to send notice of the dishonour within fourteen days after taking the protest. But the same rule does not hold in questions between indorsers, otherwise it would be in the power of the person in whose hands the bill or promissory note was first dishonoured, by withholding the intimation till the fourteenth day, to throw the loss on any of the indorsers he chose to single out. Accordingly, in the case of *Elliot contra Bell*, where it was found that notification to the last indorser was not *per se* sufficient to preserve recourse against the prior indorsers, the opinion of eminent merchants was produced, that the period for notification between indorsers themselves “ was not yet fixed by any precise rule; only it behoved to be such “ as was not protracted by any undue delay.”

The question was tried in a suspension of a charge against Harper.

The Lord Ordinary suspended the letters, thus sustaining the defences pleaded for Harper.

Against this interlocutor a reclaiming petition was preferred, which was followed with answers.

It was observed on the *Bench*, that the doctrine laid down by Mr Erskine with regard to the negotiation of foreign bills of exchange was unsupported by any authority; the rule in England being, that the dishonour should in general be notified by the next post, although particular circumstances might justify a longer delay.

The

May 1790.

COURT OF SESSION.

261

The judgement of the Court however proceeded on this ground, that in a question between two indorsers, it was sufficient for authorising a claim of recourse, that in intimating the dishonour no improper negligence could be alledged.

After advising the reclaiming petition and answers, the Lords altered the interlocutor of the Lord Ordinary, and "found the letters "orderly proceeded."

Lord Ordinary, *Justice-Clerk.* A^{ct}. *Solicitor-General.* Alt. *Wight.* Clerk, *Colquhoun.*

C.

N^o CXXXIII.

May 27. 1790.

JOHN REID, and others,

A G A I N S T

The UNITED INCORPORATIONS of MARY'S CHAPEL.

BOROUGH.—Power of the members of corporations within borough, with regard to the admission of new members.

THE wrights and masons in the town of Edinburgh, are a branch of the United Incorporations of Mary's Chapel. They have seals of cause from the magistrates, in which they are directed to admit strangers taking up their residence in the town, on their undergoing a trial, and paying the dues of entry.

It had been usual in these corporations, to admit the apprentices and children of the entered members on easier terms than other persons. The sum paid by the latter till about the year 1770, was only L. 11; it was afterwards raised to L. 21, and at last in 1787 to L. 100.

It had been also the custom in these corporations, to give to individuals a permission to follow the profession of a wright or mason for life, on paying a smaller sum than was demanded for a regular entry; but those licentiates were not admitted to any of the other privileges of the corporations, neither being maintained at the expence of the community while in indigent circumstances, nor intitled to interpose in the administration of their funds. The composition demanded from them was in 1787 increased to L. 40.

The

The legality of these proceedings was tried in mutual actions brought by the managers of the corporations on the one hand, and by John Reid and others, who were not members of the corporations, on the other.

The first question was, whether the corporations could be compelled to admit persons who had not served an apprenticeship within the borough; but the regulation above referred to respecting the admission of strangers, prevented a decision of this on general principles.

The next question regarded the powers of the corporations in regulating the dues of entry. And here the opinion of the Judges was agreeable to the determination of the Court in the case of Aberdeen, Fac. Coll. 21st July 1786, by which it was found, that the fine or composition paid by intrans burghers might be proportioned to the benefits to be derived from a participation of the trade. In the circumstances however which here occurred, the sum demanded by the corporations being thought exorbitant, was reduced to L. 50.

A third question agitated in the papers, was the power of corporations to admit licentiates. Many of the Judges expressed a doubt, how far this practice was justifiable. But the Court was prevented from giving any determination on this point; the judgement of the Lord Ordinary, finding that the corporations might enter into such a compromise, having been acquiesced in by the parties; but the sum demanded on this account was reduced to L. 30.

The interlocutor of the Lord Ordinary was in these terms:

“ Finds, that the incorporations united under the name of Mary’s
 “ Chapel, have a right to carry on their different crafts within the
 “ ancient royalty of Edinburgh, and to exclude all others who are
 “ not entered in the said corporations from exercising the crafts
 “ within the said boundaries; finds the said incorporations of
 “ wrights and masons, by their original seals of cause, subsequent
 “ practice, and admissions in the course of this process, are bound to
 “ receive strangers; that is, (when applied in contradistinction to
 “ freemen wrights and masons), such persons as have not served ap-
 “ prenticeships to masters, freemen of said incorporations, for six
 “ years, and who have acted as journeymen for two years more, are
 “ intitled to be admitted as freemen of said incorporations, and in-
 “ titled to all the benefits and privileges thereof, upon giving suffi-
 “ cient proof of their skill in their respective trades they profess, and
 “ upon payment of a certain sum; finds, upon the grounds foresaid,
 “ that the said incorporations of wrights and masons, are also bound
 “ to admit such strangers to the liberty of exercising their crafts with-
 “ in the said royalty, during their lives, without any other privileges
 “ or benefits, upon payment of a certain sum; finds, that the sum
 “ demanded

“ demanded by the said incorporations, for a full enjoyment of all
 “ the liberties, privileges, and benefits attending the respective free-
 “ doms of the said incorporations, is reasonably and properly stated
 “ at L. 100; finds, that the sum of L. 40, demanded for the liberty
 “ only of carrying on the trade of the said crafts during life, is too
 “ high, and therefore modifies the same to L. 30 Sterling.”

After advising a reclaiming petition for John Reid and others, which was followed with answers in behalf of the corporations,

The Lords, “ found, that the petitioners are legally intitled to be
 “ admitted freemen of the incorporations of Mary’s Chapel, upon
 “ being found sufficiently capable and qualified in their several
 “ trades, and on payment of L. 50 as entry-money.”

Reclaiming petitions were preferred against this judgement; the one in behalf of the corporations, complaining of the restriction as to the dues of entry, and the other for John Reid, &c. praying that the dues of entry should be restricted to L. 33 : 6 : 8, or to some smaller sum than L. 50. Both these petitions were refused without answers.

Lord Ordinary, *Henderland.* A&C. *Wight, Sir William Miller, John Clerk.* Alt. *M. Ross.*
 Clerk, *Sinclair.*

C.

N^o CXXXIV.

May 27. 1790.

ROBERT AITKIN,

AGAINST

WILLIAM GRAY.

PRISONER.—Act 1696, cap. 32. *A person to whom a Cessio bonorum had been refused, admitted to the benefit of the Act of Grace.*

GRAY, in consequence of an application by Aitkin, from whom he rented a farm, stating, that he had fraudulently disposed of his effects, for the purpose of disappointing Aitkin’s right of hypothec,

thec, was committed to prison by the Judge-ordinary, there to be detained until he should find security for the rent due by him.

Gray was afterwards arrested in prison by another creditor. Having brought a process of *Cessio*, he was opposed by Aitkin; and the Court considering his conduct to have been extremely culpable, dismissed the action. He then applied to the magistrates of the borough in which he was confined, for an aliment, in virtue of the statute of 1696, cap. 32. The magistrates having awarded an aliment, Aitkin preferred a bill of advocacy, which was passed; and

Pleaded: By our ancient law, a person confined for debt was to be maintained on bread and water, at the expence of his creditor, stat. 2. Rob. l. c. 19. But if he was imprisoned for some criminal matter, in which the public at large was held to be chiefly interested, he was to be maintained at the public expence, or, what is the same thing, out of the funds appropriated to royal boroughs for this and other necessary purposes. This distinction has been kept up by the statute of 1696. Those who are imprisoned for a *civil debt* or *cause*, may require the party at whose suit they are detained, to give them a moderate allowance, otherwise they are to be released; but the situation of prisoners for *criminal causes*, is declared to be the same as formerly. In the construction of this statute it has been held, that persons confined for any illegal proceeding, in consequence of which they are liable in damages to a private party, cannot be benefited by it. Surely then it cannot be thought, that any indulgence ought to be shown, where the cause of imprisonment is a fraud of so palpable a nature, as to preclude the guilty person from the benefit of the *Cessio*. Erskine, l. 4. tit. 3. § 28.; Dictionary, vol. 3. *voce* Prisoner.

Answered: The distinction pointed out in the statute, is evidently between *criminals* confined to prison, either in order to trial, or for undergoing some public punishment, and *debtors* imprisoned for non-performance of an obligation, for which they may be sued in the civil courts. Even although this obligation may have arisen from some culpable act, still, if, in consequence of his poverty, the prisoner is unable to provide for his own support, the legislature seems to have thought, that the loss arising from thence ought rather to fall on those who have occasioned his confinement, than on the royal boroughs, who must otherwise be subjected to it. Although a different construction has sometimes been given to the statute, this ought not to exclude a determination more agreeable to its true meaning*.

The Lord Ordinary remitted the cause *simpliciter*, and found expences due.

And after advising a reclaiming petition, with answers, the Lords affirmed the judgement of the Lord Ordinary.

Ordinary, Lord Stonefield.

A&T. Maconochie.

Alt. Tait, Wemyss.

Clerk, Sinclair.

C.

* See 7th December 1787, Clark *contra* Johnston and others, *supra*, p. 18.

N^o CXXXV.

May 27. 1790.

The TRUSTEES for the CREDITORS of Mess. FALL
and COMPANY,

A G A I N S T

Sir WILLIAM FORBES, JAMES HUNTER, and COMPANY,

A N D

Sir JOHN ANSTRUTHER.

RIGHT IN SECURITY.—BANKRUPT.—Act 1783. *A mercantile house, who had advanced money for a correspondent, and were possessed of bills indorsed and transmitted by him,—allowed, upon sequestration being awarded against him, to rank for their full debt, without deduction of the payment of the bills, received after the sequestration.*

COMPETITION.—*The debtors in these bills who had received no value for them, also allowed to rank.*

SIR WILLIAM FORBES and COMPANY were in the practice of advancing money for the behoof of Mess. Fall; and on the other hand, the bills payable to them were usually indorsed and transmitted to the former.

In particular, Sir John Anstruther having accepted, without any value, several bills in favour of Mess. Fall, to aid their credit, those bills were indorsed to and deposited with Sir William Forbes and Company.

Long after the bills were due Mess. Fall became bankrupt, and a sequestration of their effects, under the authority of the statute of 1783, was awarded. Sir William Forbes and Company immediately afterwards received full payment of these bills; but being still creditors to Mess. Fall to a large amount, they claimed to be ranked to the extent of the whole debt due to them at the time of the sequestration, without deduction of the money so paid. On the other hand, Sir John Anstruther claimed to be ranked as a creditor for the contents of the bills, for which he had not got any value.

To these claims the trustees under the sequestration objected, that Sir William Forbes and Company's claim of ranking ought to be restricted to the balance remaining after the payments received by them; and at any rate, that both they and Sir John Anstruther could not be ranked, which would be a double ranking for one and the same debt. In support of the objections, it was

Pleaded:

Pleaded: The claim of Sir William Forbes and Company seems to be ill founded, whether it be considered in reference to the common law, or to the statute of 1783.

Their right to the bills in question, not being derived either from voluntary security or from legal diligence, was merely that of retention, in the character of factors or agents for Mess. Fall; and being thus founded in equity, it ought to be confined in its exercise to an equitable purpose. But to rank for the whole of a debt, after a part of it has been paid, is contrary to equity.

Even with respect to regular securities, such a claim would not be permitted. It has been found indeed, that an adjudger might be ranked for the full sum contained in his diligence, notwithstanding partial payments posterior to its date; Kames, 16th February 1734, Earls of Loudon and Glasgow *contra* Lord Ross. But that this determination proceeded from the peculiar nature of adjudication as a sale under reversion, by which the adjudger's right continues entire until the last farthing of the debt be paid, appears from the argument contained in the reclaiming petition, in consequence of which that judgment was pronounced. When Mr Erskine mentions the same rule as holding in other cases, such as that of arrestment, he hazards an opinion which is not supported by any decision. In regard to adjudications themselves, the rule was so far restricted, that an adjudger having a separate heritable security, was not allowed to rank upon his adjudication on the same subject, without deducing what he drew in virtue of his heritable right; 12th July 1769, Creditors of Auchinbreck, Dict. of Decis. vol. 3. p. 10. In the *pari passu* rankings introduced by the act of federunt of 1662, though there must have been frequent room for this question, it never was pretended that creditors were to be ranked for their full debts, without deduction of partial payments received at any time before the actual division.

Nor is the claim supported by the statute of 1783, which in § 35, enacts, "That in case any of the creditors shall have received any partial payment out of the estates of other obligants, or in consequence of any *preferable security upon any particular subject* belonging to the bankrupt himself before the sequestration, he shall only be ranked for the balance after deduction of such partial payment; but if the partial payment be posterior to the sequestration, he shall be intitled to rank for his full debt." For by the words "preferable security upon a particular subject," cannot be understood a right of retention, but a proper legal security constituted either by deed or diligence, for the express purpose of securing a debt.

With regard to Sir John Anstruther, it is at any rate plain that he cannot be also ranked, because this would be a double ranking for one sum. To illustrate this: Suppose Sir William Forbes and Company's debt to be L. 16,000, and that Sir John Anstruther's acceptances were for L. 12,000; Sir William Forbes and Company receive after the bankruptcy L. 12,000, but still rank for L. 16,000, and recover L. 4000 from the bankrupt estate, while Sir John Anstruther again ranks for L. 12,000. Thus, a debt of L. 16,000 in effect *draws* as L. 28,000; or, in other words, the same debt *draws* twice. In like manner it is evident,

dent, that a triple or quadruple ranking may equally take place, as another set of bills might have been deposited in Sir John Anstruther's hands, the granters of which would have had the same title to rank; and so forth *ad infinitum*.

No man can grant two or more documents for the same debt, to the effect of making it rank and draw more than once upon his estate in the event of bankruptcy. For example, upon getting a loan of L. 100, one cannot, by granting five bonds for L. 100 each, enable the creditor thus to rank for L. 500. But by depositing bills or bonds in the manner above mentioned, if the double ranking were allowed, the very same thing would be done. Such a practice would operate as a tacit hypothec over a man's whole property, personal and real; and a merchant's stock in trade, which in no other way could be covered with any latent security, might in this way have one favourite debt privately and preferably secured upon it, by the multiplication of the personal obligation for the same sum.

Answered for Sir William Forbes and Company: Though Sir William Forbes and Company be considered in the character of factors, and their right to the bills as that of retention, they are not the less intitled to avail themselves of it for the payment of their debt. It is a point quite established, that factors are intitled to retention of their constituents property, till every claim competent to them against their constituents is satisfied; Bankton, b. 1. tit. 24. § 34.; Erskine, b. 3. tit. 4. § 21. The fact however is, that the bills were indorsed to and deposited with them, for the express purpose of securing money advanced. But in either case it would be a right in security.

That right they are intitled to hold, until the debt due to them be wholly discharged. In other words, they have a title to be ranked according to the full amount of their debt, notwithstanding the partial payment of it thereby obtained.

Whatever security for his debt a creditor may have obtained, whether by voluntary deed of the debtor, by legal diligence, or by lawful possession of the debtor's goods, he is intitled to the full effect of such security, as long as any part of the debt continues due. Hence, no partial payment, however large, diminishes in the least his right to the security. Thus, if a creditor-adjudger should receive a payment out of some fund belonging to the debtor, beside the subject adjudged, he will not be obliged in ranking under the adjudication to deduct that payment, but will be intitled to hold the adjudication, or, which is the same thing, to rank for the whole accumulated sum in it, till complete payment is effected; Kames, 16th February 1734, Earls of Loudon and Glasgow; Fac. Col. 2d July 1758, Creditors of Auchencbreck *contra* Lockwood. Nor was the decision in 1769 inconsistent with these, as it was then found only, that the same creditors could not be ranked twice on the same subject.

In like manner, if one has two obligants personally bound for a debt, though he should recover a partial payment from one of them, he is intitled to hold the obligation of the other to its full extent.

The same principle, it is evident, applies to bonds assigned, or to bills indorsed in security, the holder of which, by means of them, is intitled to effectuate complete payment; Erskine, b. 2. tit. 12. § 67.

In order to afford a rule for fixing the precise period from which the amount of the claims of creditors, in rankings, ought to be determined, the above-mentioned statute, in the passage already quoted, has ordained partial payments recovered *prior* to sequestration, by means "of any preferable security upon any particular subject belonging to the bankrupt," to be deducted, while no deduction is to be made of those *posterior*. Now, by the indorsation and deposition of the bills in question, the claimants acquired a preferable security upon the contents of those bills, being *a particular subject belonging to the bankrupt*; and therefore the payments obtained in consequence of that security, *after the sequestration*, are not to be deducted from their claim in the ranking. Nor is there any foundation, either in the words or the object of the statute, for the supposed distinction between different sorts of securities.

Neither can the claim of Sir John Anstruther be set in opposition to this. If he granted the bills for value, then their contents plainly formed a part of Mess. Fall's estate, affected by a preferable security in favour of the claimants. If again the bills were accepted without value, he became in effect a cautioner for Mess. Fall; and by the very nature of his obligation, he must be understood to have renounced his claim of relief, as far as it might interfere with the right of the claimants to obtain their full payment; Creditors of Macintosh *contra* Maxton, in January 1777.

On the part of Sir John Anstruther it was maintained, that he had the same title to be ranked, as if he had advanced to Mess. Fall the contents of his acceptances, taking their obligation to repay him at the expiration of a certain period.

Prior to the appearance of Sir John Anstruther in the cause, the Lord Ordinary pronounced this interlocutor:

" Finds, that Sir William Forbes and Company are intitled to be ranked for their whole debt, as it stood at the date of the sequestration, without previously imputing thereto the sums they have received since the sequestration, upon the bills indorsed to them in security before the bankruptcy; and so far repels the objection."

Sir John Anstruther having afterwards appeared and stated his claim, his Lordship took the cause to report; when

" The Lords found, that Sir William Forbes and Company are intitled to be ranked for their whole debt as it stood at the date of the sequestration, without deducting the payments since received from the bills indorsed to them in security: And found, that Sir
" John

June 1790.

COURT OF SESSION.

269

“ John Anstruther is intitled to be ranked for the debts due to him
“ by Mess. Fall, arising from the bills he paid to Sir William Forbes
“ and Company.”

A petition reclaiming against this judgement was refused without answers.

Reporter, *Lord Dregburn*,
William Forbes and Company, *Rolland*.

For the Trustees, *Buchan-Hepburn, M. Ross*.
For Sir J. Anstruther, *Wight*.

For Sir
Clerk, *Horne*.

S.

N^o CXXXVI.

June 8. 1790.

Mrs NANCY SHORTREID,

A G A I N S T

The PROVOST and MAGISTRATES of the Borough of
ANNAN.

PRISONER.—*Magistrates having delayed for twenty-four hours to incarcerate a debtor, and having afterwards, according to the custom of the borough, allowed him the privilege of open jail, liable for the debt.*

ON 26th October 1787, a debtor of Mrs Shortreid's was apprehended in the town of Annan, in virtue of a *caption* at her instance, and delivered over by the messenger to the Provost of that borough. The Provost however allowed him to remain at an inn until the evening of the twenty-seventh, when he was committed to prison.

Even then, instead of being kept in close custody, he was indulged with *the privilege of open jail*, as it was termed, by which was meant, the freedom of going through the different apartments of the prison, and likewise of access to the town-hall or court-house that was contiguous, the door of which was not locked during the day-time. This hall the debtor used as his dining-room; and being Sheriff-depute of the county, he at the same time held his court there, and determined causes as he had been accustomed to do. On the other hand, the Magistrates received a bond from certain other persons,

fons, containing an obligation to pay the debt in the event of his escape.

The debtor afterwards raised a process of *Cessio bonorum*, to which Mrs Shortreid made opposition. From this however, on receiving from a third person payment of a part of the debt, she desisted; and the debtor obtained decree.

She then instituted an action against the Provost and Magistrates, as having become liable for the debt, by acting contrary to their duty; first, in failing timously to incarcerate her debtor; and, secondly, in not having subjected him to such a state of confinement as the law required.

A proof of the usage in similar cases was taken; and it appeared, that in Annan this privilege of *open jail* had been so commonly bestowed, that there were few examples of its being withheld, where security was afforded against the consequences of the prisoner's escape; and that the Magistrates had been even threatened with prosecution for refusing it, as being an instance of illegal rigour. It farther appeared, that the same custom prevailed in the boroughs of Dumfries, Lochmaben, and Ayr.

The defenders pleaded: The short delay of imprisonment that is objected to was justifiable. "By the law of England," says Lord Bankton, "messengers ought not immediately to commit to jail the person arrested, but keep him in some safe house for twenty-four hours, that he may have opportunity to order his affairs, and, if possible, to discharge the debt. The same rule," he adds, "may be followed by our officers of the law, being founded in reason and humanity;" b. 4. tit. 37. § 14.

The indulgence afterwards granted to the debtor, was the result of an ancient and established practice, and accompanied with *optima fides* on the part of the defenders. Even the circumstance of holding a court was not singular in this prisoner, as it has appeared, that another person in the same circumstances, a justice of the peace, had formerly done so there. Acting thus *bona fide* in a public capacity, the defenders ought not to be made liable to so high a penalty for an error, if such it be, into which they have been so innocently betrayed.

It is at the same time an error from which no damage has arisen to the pursuer; nor has she been deprived thus of any legal compulsory. The law does not prohibit any kind of indulgence to prisoners that is given within doors, provided that no danger is to be apprehended from their escape; and here the pursuer was in the most effectual manner warranted against any such hazard.

Another defence arises from the circumstance of the pursuer's accepting a sum of money, as the price of her consent to the debtor's obtaining the benefit of the *Cessio bonorum*. As the defenders, who are sued in the character of cautioners, have been thus, by the creditor herself, deprived of the use of personal diligence as the means of effecting their relief, her claim against them ought on that account to be debarred. Nay "a creditor's dismissing the principal debtor
" after

"after he is incarcerated," would, according to the opinion of Lord Bankton, have the effect of liberating the cautioners; b. 1. tit. 10. § 204.

Answered: In every case without exception, where any unnecessary delay to incarcerate a debtor takes place on the part of the magistrate, the latter is subjected to the payment of the debt; Hope, *voce* Caption; 14th July et ult. November 1662, Sibbald *contra* Blyth; Stair, 2d July 1669, Farquhar *contra* Magistrates of Elgin; Fac. Coll. 13th June 1781, Bell *contra* Magistrates of Lochmaben.

With respect to the mode of the imprisonment in question, it is a jest to call it legal. A person in prison who is left with the doors open, and thus at liberty to go out when he pleases, is no more a prisoner, than if he were walking about the fields at his pleasure. He may remain in prison constrained by considerations of honour, or from other motives, but he cannot be understood as confined by the hand of the law.

That no partial usage can justify such a deviation from the duty of magistrates, has been determined in various similar cases; Fac. Col. 7th December 1780, Gray *contra* Magistrates of Dumfries; 29th June 1786, Purdie and Company *contra* Magistrates of Montrose.

Nor is there any solidity in the other ground of defence. The defenders are not to be viewed in the light of cautioners. They have incurred a debt directly *ex delicto*, and are truly become principal debtors, and not cautioners. Among *correi delinquendi* there is no *society*.

The Lord Ordinary pronounced this interlocutor: "In respect of the circumstances of the case, particularly that this is an action highly penal, and that the defenders appear to have followed a practice which, however erroneous, had long subsisted unchallenged in the town of Annan, and some other boroughs, of allowing prisoners for debt the benefit of what is called open jail, assilizes the defenders."

To that interlocutor the Court at first adhered, adding to the *rationes decidendi* there stated, the consideration "of the conduct of the pursuer in the process of *Cessio bonorum*;" but afterwards, on advising another reclaiming petition and answers,

"The Lords repelled the defences, and found the defenders conjunctly and severally liable in payment to the pursuer of the sums libelled, deducting therefrom the money paid when the pursuer withdrew her opposition to the process of *Cessio bonorum*."

A petition reclaiming against that judgement was refused without answers.

Lord Ordinary, *Esqgrove*.
Clerk, *Menzies*.

A&A. *Dean of Faculty*.

Alt. *Solicitor-General*, *Maconochie*,

S.

N° CXXXVII.

June 11. 1790.

R O B E R T B R O W N,

A G A I N S T

A N D R E W S T O R I E.

SALE.—IRRITANCY.—RIGHT IN SECURITY.— *An authority given to a creditor to sell the lands of his debtor, how to be exercised.*

STORIE disposed to a creditor of his certain lands which belonged to him, redeemable at Martinmas 1782, on payment of the sums then due.

After the elapsing of this period, the creditor was authorised, at any time before Martinmas 1784, upon six months notice, or after that term, without any previous intimation, to sell the lands by public roup, the time and place being advertised at stated intervals in the public newspapers.

It was declared that this might be done without any judicial proceedings, the right of reversion formerly competent to the debtor being voided *ipso facto*; but the surplus of the price after payment of the sums due was to belong to him.

In 1788 the creditor proceeded to dispose of the lands, in the form above described, to Robert Brown, who brought an action of multiple-pounding and a declarator, in order to try the efficacy of the sale. Storie being cited as a defender, objected to the proceedings, and

Pleaded: The only method by which a creditor can dispose of a land-estate belonging to his debtor, is that of a judicial sale under the statutes of 1681 and 1690, as enlarged by the act 23d Geo. III. cap. 18. Although it were to be agreed, that after a certain period he should have a power of selling, our law, justly jealous of the advantage which may thus be obtained over an indigent debtor, has required a previous action of declarator, for the purpose of trying the fairness of the transaction. This is agreeable to the Roman law with regard to the sale of goods impledged, the creditor, though authorised to sell, being obliged to have the sanction of the prætor; Kames's Law Tracts, vol. 2. p. 71.; Voet. ad tit. Dig. de Pign. et Hypoth.; *Id.* ad tit. De Distract. Pign.; Heinec. Antiquit. lib. 2. tit. 1. § 2.; Ibid. lib. 2. tit. 17. 18. 19. § 11.; Vinn. ad Instit. lib. 2. tit. 8. § 1.; Dictionary, voc. *Pactum legis Commissoriae*.

Answered:

Answered: Every person having the administration of his own affairs, may either directly dispose of his lands, or authorise another in his name to take the measures which are necessary for that purpose. It is expedient that those, who are so incumbered with debts as to be unable to pay what they owe, and whose property is at the same time too inconsiderable to bear the expence of a judicial sale, should be enabled to enter into agreements of this kind.

Nor do the authorities quoted on the other side support a contrary doctrine. In the Roman law, a creditor in general could not, without the interposition of a judge, expose to sale those subjects which had been impignorated to him. But if a power of selling was given, it might have been exercised without any such interference. And although in all agreements of the nature of the *pactum legis commissoriæ*, it has been held, that the irritancy being truly penal, must be recognised in a declaratory action, an extension of the same rule to such a case as the present, would be equally inexpedient and unjust.

Though securities conceived in the form of the present one have been in use for many years, this is the first instance in which their validity was ever disputed; Voet. lib. 20. tit. 20. § 1.; lib. 20. tit. 1. § 22.; Perezius ad tit. Cod. de Distract. Pign.; Bruneman. Comment. ad lib. 4. de Pignorat. act.; Vinn. lib. 2. tit. 8. § 1.; Stair, b. 1. tit. 13. § 14.; Bankton, b. 1. tit. 17. § 5.

The Lord Ordinary having taken the question to report on informations, the Court were unanimously of opinion that the sale was liable to no exception.

“ The Lords decerned in the action of declarator,” &c.

Reporter, Lord Henderland. A&A. M. Ross, Honyman. Alt. IV. Baillie. Clerk, Mitchelson.

C.

N° CXXXVIII.

June 15. 1790.

JAMES ROBERTSON,

AGAINST

JOHN SHEDDAN.

JURISDICTION.—*The justices of the peace have none in ordinary questions of debt.*

SHEDDAN having obtained a decree of the justices of the peace for the county of Ayr, against Robertson, for payment of L. 1, 7s. 1d. being the balance of an account of goods, the latter brought a suspension of that decree, on the head of incompetency.

The Lord Ordinary “suspended the letters *simpliciter*.”

In a reclaiming petition, the charger insisted on the general practice of justices of the peace exercising jurisdiction in small questions of debt; on the expediency of that practice, from the simple and summary procedure in their courts, so beneficial to the parties in respect both of time and expence; and on the decision of 24th January 1769, *Miller contra Boyd*, which was said to be the only one in point, the other determinations relative to the jurisdiction of justices of the peace having occurred in cases that involved intricate discussions of law unfit for their cognizance.

The Court however considered the total incompetency of justices of the peace to judge in any ordinary questions of debt, however small the subject of litigation might be, as a point so clear, that it did not admit of the smallest doubt; and therefore

The Lords refused the petition without answers.

Lord Ordinary, *Stonefield*.

For the Petitioner, *Cathcart*.

S.

N° CXXXIX.

N^o CXXXIX.

June 15. 1790.

Sir WILLIAM FORBES, Baronet, and others,

A G A I N S T

WILLIAM TAIT, JOHN GORDON, and others.

MEMBER OF PARLIAMENT. — NOMINAL AND FICTITIOUS. — *Trust-
oath of 7th Geo. II. not the only criterion of nominality.*

THE question between Sir William Forbes and others, freeholders in the county of Aberdeen, and Sir John Macpherson *, having been carried by appeal to the House of Lords, the judgement of the Court of Session was reversed, and Sir John Macpherson, the respondent, ordered to confess or deny the averments in the appellants pleadings respecting the nature of his freehold-qualification.

Before this determination was given, Sir John Macpherson had gone abroad. But Mr Tait, Mr Gordon, and several other gentlemen, whose qualifications in the same county stood in similar circumstances, were required to answer the questions which had been proposed to Sir John.

These gentlemen gave in answers, the particulars of which it is unnecessary to state. What seemed to be decisive, was their admitting that the freehold-qualifications had been framed with a view of increasing the political influence of the Duke of Gordon; that although the persons to whom they were granted, had come under no express engagement to vote for the candidate patronised by his Grace, they did not think themselves at liberty, as men of honour, to vote in opposition to his wishes; and that they could not with propriety refuse to renounce their freehold-qualifications, when it was necessary for the Duke's accommodation.

The Lords unanimously found, that the freehold-qualifications in question were nominal and fictitious, and appointed the names of the respondents to be expunged from the roll of freeholders.

Aft. *Dean of Faculty, Wight, C. Hay, et alii.* Alt. *Tait, Gordon, et alii.* Clerk, *Gordon.*

In some other cases from the same county, the persons whose freehold-qualifications were brought under challenge, gave in no answers to the questions put to them. The Court, considering their silence as an acknowledgement of the particulars they were required to confess or deny, appointed them to be struck off the roll.

C.

* 6th March 1789.

N^o CXL.

June 16. 1790.

E A R L of B R E A D A L B A N E,

A G A I N S T

T H O M A S L I V I N G S T O N.

GAME.—No person, however qualified by law, is intitled to hunt or kill game on the grounds of another without his consent, though open and uninclosed.

MR LIVINGSTON, a gentleman of considerable landed property, having for several days taken the diversion of killing game on some muirs belonging to the Earl of Breadalbane, but without having previously asked his Lordship's permission; the latter instituted against him an action of declarator.

The summons set forth, that by the common law of Scotland every person was debarred from searching for, hunting, shooting, or killing game on the property of another, without the leave or consent of such proprietor; and concluded, that it ought to be found and declared, that the defender had no right to come upon the pursuer's grounds, or to search for or kill game thereon without the pursuer's leave.

Pleaded for the defender: The determination of this question is not left to general inquiries into the common law. From a series of our statutes, the right of persons qualified to kill game, instead of being limited to their own private property, appears evidently to extend over the whole kingdom, with the exception of inclosures, and a few other particular places.

Though in some countries, as England or France, game is *inter regalia*; in Scotland, the animals that come under that denomination being *res nullius*, they, according to the principles of the Roman law, *cedunt occupanti*. Hence the right of killing game prior to certain statutory restraints was here universal. Of those restraints the object was twofold; both the preservation of the game itself, and the general benefit of the community.

Prior to the time of Robert III. the exercise of hunting, "except in forests, warrens, or parks," appears to have been perfectly unlimited; Mod. ten. cur. baron. c. 52. The first restriction that occurs, is one by stat. 10th of that Prince, against the killing of hares "in the time of snow," under the penalty of a fine "to the owner of the ground;" which plainly implies, that at other times the hunter had

had right to kill hares, and undoubtedly not less all the different sorts of game, on the grounds of any of the people.

The same inference is to be made from the next act of parliament that has a direct reference to the point in question, viz. that of 1474, cap. 60. It prohibits hunting or shooting "in others closes or parks." But if this only was unlawful, to hunt or shoot in open grounds, must have been permitted to all the subjects.

In like manner, when the statute of 1555, cap. 51. ordains, "that no person shall range other mens woods, parks, hainings within dikes or brooms, without licence of the owner of the ground," it imports a virtual declaration of the lawfulness of that liberty when taken in places of a different description.

The act 1600, cap. 23, which establishes certain regulations both for the preservation of the game and for the advantage of the people, sets forth the importance of hunting, "as the only means to keep the haill lieges bodies from becoming altogether effeminate." But had it depended on the caprice of individual landholders, whether or not those means could be employed, hunting would not have been considered as an object of general police; much less one of so great consequence.

By the statute of 1621, cap. 31, the possession "of a ploughgate of land in heritage," is declared to give an exclusive title to hunt; which however would have been mockery, if the person so qualified had been confined in the exercise of his right to the narrow limits of his own property.

The last of the game-laws passed by the parliament of Scotland, is the statute of 1707, cap. 13. which contains this enactment; "That no fowler, or any other person whatsoever, shall come within any heritor's ground, without leave asked and given by the heritor, *with setting dogs and nets, for killing fowls by nets;*" an enactment which plainly supposes that in other cases no such allowance is necessary, because in persons qualified, hunting is then a matter of right.

Thus the idea of the Scottish legislature is apparent, and in conformity to it has always been the general sense of the country. Nor can a single instance be pointed out, where the pursuing or killing of game in open or uninclosed grounds, has been found by any court of law to be a trespass in qualified persons. In the case of Watson of Saughton *contra* the Earl of Errol, an interdict was indeed pronounced, prohibiting the latter to hunt within the inclosures, or upon the ground of the former, *until the issue of the question*; but it was never brought to a determination; Fac. Coll. 9th August 1763. That of the Marquis of Tweeddale *contra* Dalrymple, was an action entirely confined to trespassing within inclosures, which shewed the pursuer's sense of the right, in respect of the grounds that lay open; *ibid.* 3d March 1778.

The pursuer therefore had no more right to prohibit the defender from hunting in his muirs, than he would have had to forbid the entrance there, of the officers of the law engaged in the pursuit of a criminal,

criminal, or of the people of the neighbourhood in the act of destroying a mad dog, a fox, or other noxious animals; Fac. Coll. 6th August 1785, Colquhoun *contra* Buchanan.

Answered: Exclusive possession is implied in the very nature of property. In all cases therefore where no servitude has been constituted, or statutory restraint imposed, and where the public safety does not interfere, a man has the same right to exclude all others from access to his landed property, that he has to debar them from entering into his house, or from using his furniture or cloaths.

Nor because animals *feræ naturæ* belong to the occupier, does it follow, that any person is intitled to pursue or kill them on the grounds of another. This obvious distinction is noticed in the Roman law. *Non est consentaneum*, says a Roman lawyer, *ut per aliena prædia, invitis dominis, aucupium faciatis*, l. 16. ff. de servitud. præd. rust. Vid. etiam Inst. lib. 2. tit. 1. § 12. l. 391. ff. de acquir. rer. dom. In the law of Scotland it is not less clear. Lord Stair speaking of the killing of game, adds: "From which the fiar may debar others indirectly, by hindering them to come upon his ground," b. 2. tit. 3. § 76. So also Craig, lib. 2. dieg. 8. § 13.; Bankton, b. 2. tit. 1. § 7.; Erskine, b. 2. tit. 6. § 6.

The first authority appealed to by the defender, intitled, *The manner of holding baron-courts*, as it appears from the observations of Skene subjoined to his treatise *de verborum significatione*, is of very doubtful authenticity, and deserving of little regard.

With respect to the statutes that have been quoted, the argument founded on them is sufficiently obviated by the principle, that a common-law right is never taken away by implication. But there is not here any thing of that tendency even implied. It is not unusual to protect common-law rights by additional sanctions or penalties; of which the acts, of 1474, against the robbing of dovecotes and the like,—of 1503, against slaying salmon in forbidden time,—of 1587, against destroying plough-graith in time of tillage, and houghing oxen in time of harvest,—of 1661, 1685, and 1686, against the breaking down of inclosures,—and of 1698, and 1 Geo. I. against the destroying of growing timber, are examples. The superadding then of such sanctions as occur in the above-mentioned statute of Robert III. and in acts 1474 and 1555, is not in any case evidence, that no right previously existed at common law. Of course, it affords as little proof of the want of a common-law right in similar or analogous cases.

In the latest enactment indeed that was mentioned, that of 1707, a prohibition without a penalty occurs as to a particular method of killing game. But the object of this law seems to have been, to make a distinction between that and the ordinary or fair modes of fowling; so that though a *non repugnantia* merely on the part of the owner of the ground were to be held in regard to the latter as a sufficient indication of consent, a special or express "leave asked and given" should be required to justify a practice so destructive as the first-mentioned method.

The

The statutes of 1600 and of 1621 are to be regarded as sumptuary laws, intended to restrain the passion for an expensive amusement among the lower ranks of the people, without discouraging the exercise of it in those of superior condition. Nor is there any inconsistency between the prohibition as to one class of persons, or the permission as to another, and at the same time leaving it to the latter to avail themselves of the privilege, by obtaining from individual proprietors, freedom of access to their grounds.

The decisions quoted on the other side are evidently of little importance, if indeed they do not rather support the plea of the pursuer.

The Lord Ordinary "affoizied the defender from the conclusions of the libel of declarator."

The question was then brought under the consideration of the Court by a reclaiming petition and answers.

Observed on the Bench: The right contended for by the pursuer is of a very anomalous description, as it may confessedly be annihilated at the pleasure of every proprietor who chooses to interrupt it by a wall or fence.

The Lords were unanimous, having no difficulty to discern in the "action of declarator."

Lord Ordinary, *Monteddo*. Aft. *Rolland, et alii*. Alt. *Wight, et alii*. Clerk, *Sinclair*.

S.

N^o CXLI.

June 23. 1790.

J O H N S W O R D,

A G A I N S T

J A M E S B L A I R.

WRIT.—BILL OF EXCHANGE.—*A bill bearing a stipulation for interest from the date, sustained in a competition of creditors, being holograph of the acceptor.*

PETER RATTRAY granted to Blair a bill in these terms: “*Edinburgh, 8th January 1787. Eight months after date, pay to me or order, the sum of One hundred pounds Sterling, with five per cent. of interest, at your house here, value in cash.*”

“JAMES BLAIR.

“PETER RATTRAY.”

The bill was holograph of Rattray the acceptor. On the back of it the following receipt appeared: “*29th August 1787. Received Two pounds ten shillings Sterling, as one half year's interest, by*”

“JAMES BLAIR.”

In a competition of Rattray's creditors, which took place before the Commissary-court, Sword, one of them, objected, that in consequence of the stipulation of interest the bill was null; and the Commissaries sustained the objection. This judgement was brought under review by a bill of advocacy; which the Lord Ordinary on the bills having refused, the question was stated to the Court in a reclaiming petition and answers. The complainer

Pleaded: Formerly it was no objection to a bill of exchange, that it bore a stipulation of interest before the term of payment; Dict. vol. 1. voce Bill of Exchange. Even at present a bill is good, if interest be not expressly so stipulated, though in fact it be exigible. Thus, a bill made payable “at Martinmas, with the first year's interest, twelve merks and a half,” was sustained; 10th June 1743, Schaw contra Ruffel, Kilkerran; as was also another, payable “at Whit Sunday, with a year's annualrent thereof;” 2d November 1750, Gardner contra King's Advocate. Falconer.

.But

But if in those instances the objection were justly repelled, it ought not to be admitted in the present, where there is still less appearance of any express stipulation to the effect supposed. Although indeed interest due before the term of payment was truly received, that can have no influence on the terms of this bill; especially when even the accumulating of intermediate interest into one sum along with the principal, is universally practised in the drawing of bills. Nor is it of any consequence that the receipt appeared on the back of the bill, instead of being contained in a separate writing.

Besides, as this bill was holograph of the debtor, it is a legal voucher independent of peculiar privileges. No special form of an obligation for repayment of borrowed money is required by law. It is sufficient that it be expressed in an intelligible manner, as is done in the present instance. The form thus assumed is not the worse for being that of bills of exchange.

Answered: That bills are exempted from the statutory forms, so necessary as a safeguard from fraud, is a privilege allowed for the expediency of commerce alone. Hence they ought not to be sustained, if employed for purposes foreign to their nature, as when they are made to supply the place of regular vouchers for money lent out at interest.

Though a bill bear a stipulation for interest after the term of payment, it may be good, because interest becomes then due *ex lege*, the stipulation being only superfluous, and not inconsistent with its nature. But to stipulate interest from the date, is to substitute bills in the room of regular securities for borrowed money, contrary to the design of the law. Bills, therefore, containing such a stipulation, are now held to be null and void; Kilkerran, 23d February 1741, Paterston *contra* Finlay; Ibid. 11th December 1750, Lockhart *contra* Merrie; Fac. Coll. 15th November 1757, Douglas and Lindsay *contra* Brown; notwithstanding that at a more early period a different rule appears to have prevailed.

That the bill in question is so drawn as to bear interest from its date, is evident; for it expresses that the interest, as well as the principal sum, is to be due at its term of payment. Besides, the receipt on the back of it shews that the interest was actually so paid. And the objection ought to have the greater weight, as coming, not from the acceptor, but from his onerous creditors.

With regard to the plea founded on the bill's being holograph, it is sufficient to remark, that if viewed otherwise than as a bill of exchange, it could hardly be considered as importing any obligation whatever.

The Court were unanimous, that the law as formed by the later decisions, annuls bills which stipulate interest before the time of payment; but several of the Judges doubted the propriety of having gone farther than merely to disannul that improper paction, leaving those bills in which it was contained, effectual in other respects. No doubt

doubt seemed to be entertained of the illegality of the stipulation in this case. But the circumstance of being holograph, appeared chiefly to move the Court to sustain this bill, which, it was acknowledged, had been granted for a just debt.

The Lords therefore passed the bill of advocacy.

Lord Ordinary, *Dreghorn*.

For Sword, *Wight*.

Alt. *Honyman*.

Clerk, *Sinclair*.

S.

N^o CXLII.

June 24. 1790.

CHARLES and JAMES BROWN and COMPANY,

A G A I N S T

WILLIAM WILSON.

MEDITATIO FUGÆ. — CAUTIONER. — *The endurance of a cautionary obligation de judicio fisti.*

M^{ESS.} BROWN and COMPANY having arrested a debtor of theirs as being *in meditatione fugæ*, Wilson became bound as cautioner for him in the usual form, "that he should appear personally before any competent Court in Scotland, and answer to any action which might be tabled against him at the instance of Charles and James Brown and Company, touching the debts specified in the warrant of arrestment, at any time within six months after the date of the bail-bond, when lawfully summoned for this effect, and that he should attend all the diets of the Court touching said action."

The date of this cautionary obligation was 20th November 1788. On 27th November, the debtor was personally cited before the Magistrates of Dumfries; and on 29th November decree in absence was pronounced, which the pursuers, on account of the defender's bankruptcy, were authorised to extract without waiting the ordinary *induciæ*. To these proceedings the cautioner was not made a party; nor was the decree ever extracted by the pursuers.

The debtor remained in Scotland till 12th January 1789. On 24th February 1789, after he had left the country, a new action was brought

brought against him and his cautioner in the Sheriff-court of Dumfries. The Sheriff having found the cautioner liable, a bill of advocation was preferred; when, in support of the judgement, Mess. Brown and Company

Pleaded: The purpose of a *meditatio fugæ* warrant, is to oblige the party to remain within the jurisdiction of the courts in Scotland, not only till the claims against him are constituted by a decree, but also till an opportunity is given of compelling payment by imprisonment in the ordinary course of law. The obligation of the cautioner, who interposes to prevent the immediate execution of the warrant, ought therefore to be so explained as to insure the accomplishment of this purpose. Hence, if before extracting the decree the debtor shall escape from Scotland, the cautioner must be liable for the debt. Accordingly it seems to have so been found, 15th December 1774, Telfar *contra* Muir.

It is of no consequence, that in the present case a decree in absence had been obtained, without making the cautioner a party to the action, and without requiring him to produce the person of the defender. It is in the power of a pursuer at any time to desert the action which he has commenced; and as the latter process, as well as the former, was instituted before the lapse of the six months from the date of the bail-bond, the cautioner has no reason to complain. Indeed, although no second action had been brought, the situation of the parties would have been the same. A decree in absence, as it has not the effect of foreclosing the defender or his cautioner, ought not to introduce any forfeiture of the pursuer's right. And the determination of the case must be the same, as if before pronouncing any sentence, the cautioner had been required to fulfil his obligation; Erskine, b. 1. tit. 2. § 21.; Stair, b. 4. tit. 47. § 23.

Answered: The origin of *meditatio fugæ* warrants in Scotland, is to be found in the Roman law, by which the defender in any action might be required to find security *judicio fisci*. Hence till judgement is given, the cautioner is obliged, when required, to produce the person of the defender. But after this period, although, on a new application, the Judge will authorise a second arrest until a proper warrant of imprisonment can be obtained in the ordinary way, the cautioner is necessarily released from his obligation. The universal practice accordingly is, that the pursuer, before any definitive judgement is given, requires the cautioner to fulfil his engagement. Otherwise the obligation of the cautioner must be supposed to subsist during the course of the long prescription.

In the present case, after a decree had been pronounced in the action originally brought, the obligation of the cautioner was at an end; nor could it be revived by the unwarranted measure of bringing a new action, which was calculated for no other purpose than to subject the cautioner, after the debtor himself had been allowed to elope; Voet. ad lib. 2. tit. 8. Dig. § 11.; Sir James Cockburn *contra* Inglis, 1776.

The Lord Ordinary “advocated the cause, and assilzied the cautioner;” but after advising a representation, with answers, he took the cause to report.

The opinion of the Court was, that by the mere act of obtaining judgement, without requiring the cautioner to produce the body of the defender, the security of the creditor was not entirely at an end, but that such a requisition might be made at any time before the elapsing of the period allowed for extracting the decret.

The Lords adhered to the judgement which had been pronounced by the Lord Ordinary.

Reporter, Lord Dregburn.

A&C. Cathcart.

Alt. W. Robertson.

Clerk, Mitchellson.

C.

N^o CXLIII.

June 30. 1790.

WILLIAM GLEN,

AGAINST

The CREDITORS of WILLIAM MACALPINE.

PACTUM ILLICITUM.—USURY.—*An obligation to pay more than the ordinary rate of interest, legal, where an unusual risk is run.*

IN April 1785, Macalpine, the owner of a small coasting vessel, having received L. 175 in loan from Glen, conveyed to him the property of the half of his vessel. He also became bound to pay interest at the rate of 10 *per cent.* Mr Glen being excluded from the profits arising from the ship.

Both parties were authorised, after giving two months notice, to withdraw from the bargain, which was also to cease at the death of Macalpine, or on his selling the vessel. It was farther provided, that if the vessel was lost, the creditor was to have no claim for the sums advanced; but in case of salvage, he was to have a rateable interest in the articles saved.

At

At the desire of Macalpine, Glen procured insurance on the vessel to the amount of L. 300. Afterwards, on its being lost, Macalpine having become bankrupt, a competition for the insured sums arose between Glen and the other creditors; who, in an action brought in the Admiralty Court, which was afterwards transferred to the Court of Session, called in question the legality of the above-mentioned agreement, and

Pleaded: In contracts of bottomry, or at *respondentia*, where the creditor betakes himself to the security of a ship, or the goods on board of it, during a particular voyage, it is permitted to take more than the usual rate of interest, the extraordinary premium being accurately proportioned to the particular risk. But the agreement in question was very different. The right of the lender was not of the nature of a security, but a vendition, the property of one half of the vessel having been directly conveyed. The same exorbitant recompence for the use of the money might have been demanded, although the vessel had remained in harbor till the loan was at an end. The creditor too, after two months notice, might have withdrawn himself from the hazard of loss; and he was also intitled to the benefit of salvage, which a creditor by bottomry, or at *respondentia*, never is. Such an agreement seems to be quite anomalous, and indeed a mere cover for an usurious loan; Park on Insurances, p. 468. 475. 483. 499.

Answered: The agreement between the parties, though not precisely the same with those which generally go under the name of bottomry or *respondentia* contracts, is a fair and equitable one, the risk undertaken by the creditor being much greater than in ordinary cases. It is truly a peculiar species of bottomry, adapted to the circumstances of a coasting trade; and although in general a creditor at *respondentia*, or by bottomry, is not intitled to salvage, this may be otherwise regulated by special agreement. In the case of money lent on vessels or merchandise going to or from the East Indies, it has been provided by statute, that the lender shall have this benefit; 19th Geo. II. cap. 37.

It appeared, that a claim had been entered in behalf of Mr Glen for the whole premium paid by him to the underwriters, which was also founded on for showing the illegality of the bargain; but as it had arisen from the inaccuracy of the Procurator in the Admiralty-court, no regard was paid to it.

It was also stated, that the policy of insurance, as having been obtained without any specification of Mr Glen's interest, was therefore ineffectual, agreeably to the decision Glover *versus* Black, reported by Burrow, vol. 3. p. 1394. But as no objection was made by the underwriters, the information given to them by the broker having been sufficiently explicit, this circumstance was likewise disregarded.

The

The question being reported on informations,

The Lords preferred Mr Glen to one half of the insured sum, and to the premium paid by him for insuring that part of the vessel which was at the risk of William Macalpine.

Reporter, Lord E/sgrove.

Act. Macormick.

Alt. Wight.

Clerk, Home.

C.

N^o CXLIV.

July 7. 1790.

The ATTORNEY of YOUNG and COMPANY,

AGAINST

ALEXANDER IMLACH.

PACTUM ILLICITUM.—*How far action lies for the price of contraband goods furnished by British subjects abroad.*

IMLACH commissioned a quantity of tobacco and rum from Henry Greig, a merchant in Gottenburg, but a native of Scotland. The bill of lading bore *the exception of seizure*; and it was evident, that Greig knew of the goods being destined for a smuggling adventure. From his letters it appeared, that he had been looking out for a cargo of such contraband goods for Imlach's use, and that on a former occasion he had employed his own agents at London to make an insurance of a cargo of that sort sold by him to Imlach, against the hazard of seizure by the revenue-officers, as was evinced by the amount of the premium.

The goods were seized on their arrival in the frith of Forth, and carried into condemnation. Greig afterwards drew bills on Imlach for the value, in favour of Young and Company, his agents in London.

In consequence of a commission likewise from Imlach, John Christian, a native of the Isle of Man, who carried on trade at Dunkirk, of which town he was a burgher, shipped for him a quantity of Geneva. The bill of lading in this case, mentioned the ship's being bound for Bergen

Bergen, and expressed nothing as to the hazard of *seizure*. It appeared, however, that Christian's agents at London had, at his request, insured part of this smuggling cargo for Imlach. The vessel carrying the goods happened to be totally wrecked in the Murray frith.

Imlach having granted a promissory note for the value, it was indorsed to Young and Company, who were also agents for Christian. They accordingly, in the name of an attorney, brought an action against him, for payment of both parcels of goods, before the Admiralty-court, where they obtained decree. A bill of suspension was presented, which the Lord Ordinary reported to the Court, who appointed memorials on the cause.

The argument contained in them was not, in any thing material, different from that which occurred in the case of Cantley, 11th February 1790*.

On advising the memorials, the Lords by a small majority "passed the bill."

Reporter, *Lord Justice-Clerk.* A&A. *Abercromby.* Alt. *Cullen.*

S.

* Vid. *supra*, p. 210.

N° CXLV.

July 10. 1790.

MARGARET DALZIEL,

AGAINST

JOHN RICHMOND.

WITNESS.—*The evidence of the mother and sister of a pursuer in a declarator of marriage inadmissible.*

IN an action of declarator of marriage, Margaret Dalziel the pursuer adduced, beside other witnesses, her father, mother, and sister. The Commissaries admitted the evidence of the father, and the defender having acquiesced in that judgement, he was examined. Other witnesses were also examined, but their testimony proved nothing decisive of the question. The Commissaries then, after a strenuous opposition, likewise found the evidence of the mother and sister to be admissible; upon which the defender presented a bill of advocacy, and

Pleaded: When persons nearly related to a party appear as witnesses in his behalf, they approach more or less, according as the relation is close, and of consequence the interest strong, to the situation of a man bearing evidence in his own favour. It never was, therefore, or could be made a question, whether such were legal or impartial witnesses. The only doubt was, if in cases where a *penuria testimonii* was the result of the circumstances, their testimony could be at all received, not as proper parole-proof, but rather as of the nature of real evidence, tending to corroborate or illustrate what antecedently had been in some degree, though imperfectly, proved. Of this kind of evidence then, the sole efficacy consists in its having a relation to such antecedent proof. But in the present case, there exists no sort of previous evidence of the pursuer's allegation, the testimony of her father being justly disregarded.

Answered: Clandestine marriages are not put *extra commercium*. Such evidence then as is consistent with the nature of the transaction, must be admitted with regard to them. As the secret will naturally be intrusted to the near relations of the parties, they, of course, become necessary witnesses. Accordingly, in the case of Sibilla Barber *contra* Stewart, the brother and sisters of the pursuer of a process of adherence were received as witnesses *cum nota*, 31st July 1732, Dict. vol.

vol. 2. *voce* Witnesses. And in the later case of Cameron *contra* Malcolm in 1756, when a declarator of marriage was brought by the man, and a declarator of freedom by the lady, the mother and sister of the latter were received as witnesses in her behalf.

Replied: With respect to the case of Cameron and Malcolm, the pursuer there, by the nature of his plea, made a sort of appeal to the evidence of the defender's mother. Besides, the counter action went on the allegation of the crime of abduction.

The bill of advocacy having been passed, the Lord Ordinary before whom the cause afterwards came, took it to report on informations, when

The Court strongly expressed their sense of the importance of the case in point of precedent. No temptation to perjury, it was observed, could operate more irresistibly, than that to which parents would be liable, if the fate of their children were made to depend on their testimony in a process of declarator of marriage; an idea in every view alarming to society. The objection to a brother or a sister's evidence in similar circumstances, was considered as also insurmountable.

To the decision in the case of Barber, little respect seemed to be paid; the distinction having been made betwixt that *penuria testium* which necessarily results from the situation of the party requiring evidence, as where a crime has been committed against him, of which the case of Malcolm was an example, and such a *penuria* as arises from his own fault.

The Lords "remitted the cause to the Commissaries, with an instruction, to alter their interlocutor, and to refuse to admit any of the witnesses."

Reporter, Lord Dregburn. A&A. Cathcart. Alt. Stewart. Clerk, Sinclair.

S.

DECISIONS

OF THE

COURT OF SESSION.

N^o CXLVI.

November 16. 1790.

CREDITORS of JAMES STEIN,

AGAINST

ASSIGNEES to the Estate of SANDEMAN and GRAHAM.

RIGHT IN SECURITY.—BANKRUPT.—Act 1783, § 35.—*How far bills remitted and discounted prior to the bankruptcy of the remitter, though not payable till afterwards, are to be deemed collateral securities.*

SANDEMAN and GRAHAM, merchants in London, being the agents or correspondents of Stein, a distiller in this country, he was accustomed to consign to them large quantities of spirituous liquors destined for the London market. He likewise occasionally remitted bills to them. On the other hand, he frequently drew bills upon them, to an amount greatly exceeding the value of his consignments and remittances.

At a time when Sandeman and Graham had come under acceptances for Stein to the extent of L. 58,000, but which were not yet payable; and when they had received bills for L. 39,000, as the price of his spirits, or that had been remitted by him, of which the times of payment were likewise not come, though all of them had been already discounted, and the proceeds applied for discharging debts due by Stein; he became bankrupt, as they also did. Beside the L. 39,000, they had paid L. 12,000 of other debts for him.

The assignees under the commission of bankrupt issued against Sandeman and Graham, claimed at first to be ranked on Stein's estate for L. 58,000, the amount of their acceptances for him; but as the holders of these bills, none of which had been paid, made the same claim, that of the assignees was soon given up.

They afterwards, however, framed another claim thus: They maintained, that the bills for L. 39,000 not having been payable at the time of the bankruptcy, were, although discounted, to be understood as unpaid, and as effects or securities then in their possession; of which they were entitled to avail themselves, under the statute of 1783, for obtaining payment of all the debts owing to Sandeman and Graham by Stein, and comprehending, beside L. 39,000 paid out of the discounted bills, the other sum of L. 12,000, and such farther sums as should be drawn out of the estate of Sandeman and Graham by the holders of the L. 58,000 bills.

Against this claim the other creditors of Stein objected, and

Pleaded: The bills for L. 39,000, being, in the mercantile phrase, good bills, which could be discounted at any time, were equivalent to so much money *minus* the discount, and of course to be considered as truly payments made to Sandeman and Graham. The immediate employment of this money which took place, was the only way in which they could fulfil their duty to Stein their constituent. Yet the present claim implies an use of those remittances contrary to the sense of both the parties at the time, as well as to the duty of one of them. Nay, its very object is, to establish in Sandeman and Graham, against Stein's estate, a debt purchased with his own money.

If remittances of this kind were not to be regarded as payments, every banker who discounted a bill, beside having an action of recourse, would, with equal propriety, be deemed a *creditor hypothecarius* in respect to such bill, as a pledge or security for all the debts that the discounteer might owe to him.

At any rate, those bills cannot be securities for relief of the L. 58,000 of acceptances by Sandeman and Graham. By the claimants hypothesis, the L. 39,000 bills are part of the estate of Stein; but it is admitted, that for the L. 58,000 acceptances they cannot rank on that estate. Besides, it would be incongruous for a cautioner to with-hold, for his own relief, any part of the debtor's funds, to the prejudice of the creditor.

The matter, indeed, would in this case become inextricable, by producing an indefinite series of rankings. On replacing out of the L. 39,000 bills the dividend of Sandeman and Graham's estate,
drawn

drawn by the holders of the L. 58,000 acceptances, a new estate to that amount would be created, to undergo a similar distribution; in which these holders would again have a share, so as to occasion another defalcation of the L. 39,000; and thus the same succession would go on *ad infinitum*.

Answered: Sandeman and Graham cannot be supposed to have received as cash all the bills remitted by Stein; which, in effect, would have been to become the guarantees of the acceptors. These bills were no more than securities in their hands; of which the claimants in their right are, by the statute of 1783, entitled to the same use that was sanctioned by the Court, in the case of the creditors of Fall*.

Nor could the discounting of the bills make any essential difference. On this occasion Sandeman and Graham were, truly and substantially, borrowing money from their bankers upon their own credit, aided by the deposit of Stein's bills, over which they had a right in security. The case was the same, as if, instead of remitting bills, he had assigned to them a bond, or impledged in their hands any moveable of value, and they, on borrowing money, had transferred to the lender, for his farther security, such bond or moveable; an operation surely that could not be considered as a payment by Stein, so as to diminish any balance due by him. On the contrary, this would still have remained unaltered, until actual payment of the bond, or sale of the moveable.

The L. 39,000 of remittances being then regarded, not as payments, but as effects of Stein's in the hands of Sandeman and Graham at the time of the bankruptcy, the proceeds are now to be applied for payment of every debt due by him to them; in which is plainly comprehended whatever dividend shall be drawn out of their estate, by the holders of the L. 58,000 bills.

Nor will any intricacy occur in this application: For if the dividends of these holders be deducted from the L. 39,000, and the remainder imputed towards payment of the cash advanced, (L. 51,000, or L. 39,000 and L. 12,000), there will still remain such a balance, as the corresponding dividends of Stein's other estate will be insufficient to extinguish; and, of consequence, the claimants must continue ranked for that full sum, as long as there are any dividends to be drawn.

Replied: The discounting has been spoken of, as in effect borrowing on the credit of Sandeman and Graham, so as to bring them under some obligation, or to expose them to some risk. But in truth, they could only be bound, in any event, to pay back what they had thus received; in the same manner as if Stein had sent them a bag of money, that they afterwards delivered for value, which, on its being discovered that the coin was bad, they were obliged to restore.

* See p. 265, Trustees of Fall's creditors *contra* Sir W. Forbes and Company.

In the case of Fall's creditors, the bills were not delivered as cash, but merely as pledges ; by which circumstance it is essentially discriminated from the present.

And as to the double ranking, the difficulty is not solved ; for it was not adverted to, that on the dividends being replaced out of the L. 39,000 bills, a new estate would be produced, and an endless series of rankings begun. For this reason probably it is, that no other instance can be produced of a claim of relief for dividends.

The Lord Ordinary pronounced this interlocutor : " Finds, That
" the assignees are not only intitled to be ranked for the sum of
" L. 39,000, and for L. 12,000, making up together the total balance due to them, and to draw a corresponding dividend accordingly, till by such dividend, and by the produce of the collateral securities in their hands, they shall be fully paid of the above-mentioned total balance ; but also, that the said assignees are further
" intitled to be ranked, and to draw as aforesaid, ay and until they
" shall be fully paid and relieved of the amount of any dividend
" that has been or shall be recovered out of the estate of Sandeman
" and Graham, by the holders of their acceptances for the other sum
" of L. 58,000."

At first, upon advising a reclaiming petition and answers,

The Court adhered to the Lord Ordinary's interlocutor.

On advising, however, a second reclaiming petition and answers, the following judgement was pronounced :

" The Lords alter the interlocutor complained of, and find, That
" the assignees can only be ranked for L. 12,000." To which judgement, by a very narrow majority, they adhered, after again advising the cause on a reclaiming petition and answers.

Lord Ordinary, *Justice-Clerk.*
onechie. Clerk, *Henz.*

For the Assignees, *Solicitor-General.*

Alt. *Mac-*

S.

N^o CXLVII.

November 16. 1790.

ARCHIBALD and JAMES ROBERTSON,

AGAINST

JOHN LAIRD.

PERICULUM.—POLICY OF INSURANCE.—*The clause in a policy, "with leave to call at a port," how understood.*

LAIRD, at the request of Archibald and James Robertson, insurance-brokers, underwrote, along with other insurers of Greenock, a policy as follows, viz. "On tobacco, from the loading on board the Fanny, at her ports in Virginia, say her loading ports in Virginia, and to continue and endure until she shall arrive at Rotterdam, (*with leave to call at a port in England*), and until the tobacco be there safely landed."

The owner afterwards intimated to the brokers, his having lately received a letter, from which it appeared probable, that instead of Rotterdam, the vessel would proceed to Hull in England, and there discharge her cargo; directing them at the same time, if the underwriters agreed to the alteration, to get them to subscribe an indorsement on the policy to that effect.

Such an indorsement was accordingly subscribed by the other underwriters, but not by Mr Laird.

The vessel was actually cleared out for Hull, and in the course of her voyage to that port she was wrecked.

The brokers, having paid to the owner the sum insured by Laird, with respect to whom they had not fulfilled the direction given to them, brought an action against him for repayment.

Pleaded for the defender: The vessel was lost on a voyage, not to Rotterdam, according to the terms of the policy, but to Hull, a port that it did not comprehend. It bore, indeed, "leave to call at a port in England;" but liberty to call at a port can only be understood of one situated in the line of the voyage. In the present case, this liberty might apply to some port in the English channel, such as Plymouth, Falmouth, or Dover, all of which lie in the course from America to Holland, and at the last of which it is usual for vessels on this voyage to call, in order to get pilots for the Dutch coast; but it

could never comprehend the port of Hull, which is so remote from the navigation. If not confined to the course of the voyage, no other limit could be set to such an allowance; and a ship insured to one port, with liberty to call at another, might have her voyage ever so much altered and prolonged, contrary to the meaning of the insurer.

No case similar to the present seems to have been decided either in this country or in England. In the Courts of Amsterdam, however, two instances of this kind occurred, as mentioned by Bynkershoek; in which judgement was given agreeably to what has been now maintained. *Quæst. Jur. priv. lib. 4 cap. 3. 8.* Millar on Insurance, p. 437.

Answered: No such criterion can be resorted to for explaining the clause in question; because, strictly speaking, there is not any port in England, more than in the West Indies, that lies in the course of this navigation. If, however, the liberty here granted had been to call at a port in the West Indies, such a stipulation, it must be admitted, would, when so qualified, have become inextricable and nugatory. The liberty, therefore, in question must be that of calling at any port within the bounds specified.

The question came before the Court by a bill of suspension, presented by Mr Laird, of a decree of the Judge Admiral against him. It was reported on memorials; after which, agreeably to the opinion of the Court, which seemed to be, that the expression in dispute should be construed to mean any port in England, at the discretion of the insured or of the shipmaster, which would not occasion an unreasonable deviation from the plan of the voyage,

The Lord Ordinary refused the bill.

The cause having been again advised by the Court, on a reclaiming petition and answers,

The Lords adhered to the Lord Ordinary's interlocutor.

Reporter, *Lord Stonefield.*
Clerk, *Sinclair.*

Ast. *John Clerk.*

Alt. *Rolland, Jo. Millar.*

S.

N° CXLVIII.

N^o CXLVIII.

November 17. 1790.

ROBERT PUNCHEON,

A G A I N S T

The TRUSTEE for the CREDITORS of JAMES HAIG and COMPANY.

MUTUAL CONTRACT.—REPARATION.—*Upon a master's bankruptcy, the servant's claim for wages is subject to deduction of what was otherwise earned by him.*

PUNCHEON, in spring 1784, was hired for seven years as a machinist or engineer, by James Haig and Company, who carried on an extensive distillery. His salary, during the three last years of his engagement, was to be L. 150 *per annum*.

Haig and Company stopped payment in April 1788. Punccheon, however, remained unemployed till the month of September following, when he entered into a new service.

In the distribution of the effects which belonged to the bankrupts, Punccheon having made a claim for his salaries during the unexpired term, the trustee for the other creditors objected, and

Pleaded: Whatever the stipulated endurance of the agreement between a master and his servant may be, it is generally understood, that, in case of the disability of either of the parties to fulfil their engagements, the contract is at an end at the subsequent term. It is evidently just, that this should be the rule. As, on the one hand, it would be extremely unjust, when a servant, from bad health, has become unable to discharge his duty, if his master could for that reason withhold the wages previously earned; so, when a similar misfortune befalls the master, it would be not less unjust, were the servant's claims to suffer no limitation. The claim thus arising, either to master or servant, ought to be restricted to the actual damage; and therefore all that can in this case be demanded, is the difference between the wages formerly stipulated and those actually earned.

Answered: In the ordinary case of master and servant, it being understood that each party, after reasonable notice, may give up the bargain at the ensuing term, it is just that the death or disability of any of them should be attended with the same effect. But where,
by

by special agreement, the obligations of the parties are to endure for an unusual period, the conditions of the bargain are to be accurately fulfilled. There, it is to be presumed, that the certainty of employment was in the view of both parties; and therefore to disappoint the servant of that advantage, without an increase of his wages, would be unjust; and if, without seeking any new employment, he might have demanded his wages during the whole term, it would be no less inconsistent with expediency than with justice, should the consequence of his following a more industrious line of conduct be favourable, not to him, but to his former employer only. *Voet. ad Dig. lib. 19. tit. 22. § 27.*

The Lord Ordinary found "Puncheon intitled to his full salaries."

But after advising a reclaiming petition, with answers,

The Court being of opinion, That in cases of this kind the claim of a servant was for damages only,

The Lords "altered the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship," for the purpose of adjusting the extent of Puncheon's claim.

Ordinary, Lord Justice-Clerk.

Adv. Wyld.

Adv. Macanochie.

Clerk, Menzies.

C.

N° CXLIX.

November 18. 1790.

THOMAS KINNEIL,

AGAINST

ALEXANDER MENZIES.

SALE. — *Sale retenta possessione ineffectual.*

A TENANT of Kinneil's having become bankrupt, a sequestration of his effects was awarded by the Sheriff of the county.

Upon this, Menzies claimed the property of several articles of household-furniture found in the tenant's possession. He proved, that

a sale had taken place, and that his not removing them was owing to the tenant, who was willing that they should remain where they were, as long as it might be convenient.

The sheriff having sustained the claim, a bill of advocacy was preferred, which was followed with answers.

The Lord Ordinary affirmed the judgement of the sheriff, "in respect that every presumption of fraud or collusion between Menzies and the bankrupt had been removed by the evidence."

A reclaiming petition was preferred by Kinneil, which was followed with answers:

The Court altered the interlocutor of the Lord Ordinary, on this ground, that the agreement of sale, though *bona fide* made, had not been fulfilled by delivery, the goods sold still remaining in the possession of the seller. Erskine, book 3. tit. 3. § 5.

The Lords found, That the articles of household-furniture claimed by Menzies fell under the sequestration.

Ordinary, Lord Monboddo.

A&S. Tait.

Alt. Macormick.

Clerk, Colquhoun.

C.

N^o CL.

November 18. 1790.

The UNIVERSITY of GLASGOW,

A G A I N S T

The EARL of SELKIRK, and others.

CAUTIONER.—*A Cautionary obligation, limited strictly to the terms in which it was expressed, though the meaning of the parties appeared to extend farther.*

THE University of Glasgow, in 1745, appointed a factor over the estates belonging to it; and on this occasion a contract was executed between the University and the factor, to which, in the character of cautioners for him, the Earl of Selkirk, William Miller, and Alexander Stirling were parties.

In this contract, the subjects of the factory were specially enumerated and described, and particularly the following: "All and sundry the fruits, rents, teind-duties, casualties, and emoluments, real or casual, belonging to the Archbishoprick of Glasgow, which the said University has been in use to receive formerly, and has right to uplift and receive, *by virtue of a lease granted by the Crown, to endure for nineteen years after Whitsunday 1736:*" Which rents and emoluments the factor was empowered to levy "for the crop and year of God 1745, and in time coming thereafter, *ay and until these presents be recalled,* by a writ under the hands of the principal and professors of the University."

On the expiration of this lease in 1755, a new one was obtained; and for many years afterwards the factor continued in the management.

At length, upon his resignation, and a final settlement of his accounts, it appearing, that during the period posterior to the expiration of the above-mentioned lease, there was a considerable deficiency as to those rents in particular, the University raised an action against Lord Selkirk and the heirs of the other cautioners, for payment of that sum; in defence against which, they

Pleaded: A particular tack having been referred to in the contract, the cautioners were not liable for intromissions subsequent to its expiration; since obligations of that sort ought to be strictly limited by the terms in which they are conceived.

Although of deeds of settlement *mortis causa*, or of *bonæ fidei* contracts where mutual value is given, a latitude of interpretation may be allowed, conformable to the will of the granter, when clearly discovered, though not fully expressed; cautionary engagements being *strictissimi juris*, admit no such licence. In them, no higher or more extensive obligation on the cautioners, than that which the terms clearly import, can be inferred from any other circumstances. Kames, Rem. Dec. 2d June 1749, Colt *contra* Angus; Princ. of Equity, p. 42.

Answered: The same motives that induced the cautioners to interpose at all, would naturally incline them to continue their engagement as long as the factory was to last; and that the university, of whose revenue the Archbishoprick was always considered as a permanent portion, so understood the matter, is evinced, by their not requiring a renewal of the caution when the lease came to expire. The particulars of this, were mentioned merely in the way of description; while the endurance of that obligation was sufficiently intimated by the expression, relative to the duration of the factory, "ay and until these presents be recalled."

Nor is there any ground for applying to cautionary obligations the same strictness of construction that distinguishes the limitations or fetters of an entail. Even in cases where writing is required as a solemnity, effect has been given to the meaning of the parties, though not completely expressed in the instrument. Thus teinds, a subject distinct from lands, have been found to be implied in a disposition where

where they were not mentioned. Dict. of Dec. *voce* Teinds; Kilkerran, *voce* Teinds.

Neither is there any solidity in the distinction, founded on the supposition of no value being given for a cautionary obligation; for by the creditor value is plainly given, which otherwise would have been with-held. Such a mode of construction, by which a mere imperfection or inaccuracy in description is made to limit the obligation, would lead to the most unreasonable consequences. For example, part of the rents of the Archbishoprick are described as payable to the town of Glasgow, which is true; but suppose they had been conveyed to another, then that inaccuracy would thus have so far annulled the cautionary obligation. The same may be said of teinds described as set to the Duke of Montrose, supposing them to have been in fact set to some other person. As no doubt could have been entertained of the meaning of parties, the defenders doctrine applied to such cases appears in its true light; and yet the present admits as little question with respect to intention.

Of the contrary and more reasonable interpretation of cautionary engagements, the following cases are examples. Forbes, 23d January 1711, Creditors of Park Hay *contra* Falconer; Fountainhall, 18th June 1706, Hamilton *contra* Calder; Kilkerran, 6th December 1749, Scott *contra* Carnegie; Ibid. v. *Falsa demonstratio*, 5th July 1743, Hamilton and Baird *contra* Hunter; Fac. Coll. 8th July 1758, Grant *contra* Forbes.

The cause was reported by the Lord Ordinary, when it was

Observed on the Bench: The cautioners certainly intended to continue bound during the subsistence of this factory. But that intention is not sufficient. Cautionary engagements are not, from ideas of the views of parties, to be extended beyond the precise import of the words by which they are expressed.

“ The Lords sustained the defence, that the defenders can only be
“ liable for the intromissions of the factor with the rents, profits, and
“ teind-duties of the Archbishoprick of Glasgow during the period of
“ the lease thereof mentioned in the factory and contract; but for
“ none of the intromissions had by him under any subsequent leases
“ of that Archbishoprick, that may have been procured by the pur-
“ suers.”

A petition reclaiming against this judgment was refused without answers.

Reporter, Lord Swinton.
Clerk, Menzies.

Aa. Rolland, Jo. Millar.

Alt. Wight.

S.

Nº CLI.

N° CLI.

November 18. 1790.

The UNIVERSITY of GLASGOW,

AGAINST

Sir WILLIAM MILLER and Mrs JANET STIRLING.

CAUTIONER.—PERSONAL AND TRANSMISSIBLE.—*A cautionary obligation does not fall by the cautioner's death, but continues upon his heirs.*

ALEXANDER STIRLING and William Miller, along with the Earl of Selkirk, who, as mentioned in the preceding report, interposed as cautioners in behalf of a factor for the University of Glasgow, "Bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors, that the factor should make payment to the University, of his whole intromissions with the rents of its estate."

Upon a final settlement of accounts, a balance arose against the factor; but that debt was not incurred till after the deaths of Mess. Miller and Stirling. In the action instituted against their representatives and the Earl of Selkirk, the surviving cautioner, the former, in defence,

Pleaded: The cautionary engagement ceased when the cautioners died. If any loss had then arisen, the obligation of relief would have been a debt that the deceased had owed, and of course would have been transmitted against their heirs; but no such debt could be transmitted, when none existed.

Had the obligation made no mention of heirs, it is not likely that the present claim would have been thought of; and yet if an effect altogether singular be not given to this circumstance, it cannot in the least vary the case. The sole import of the obligatory words respecting heirs uniformly is, to devolve on them the debt previously incurred by the ancestor; as for instance, in the case of a bond for money lent, and in such a one as the present, if during the cautioner's life the failure against which he is surety has taken place. But those words never have the effect of creating a new obligation or debt against the heir, after that which lay on the ancestor has been extinguished.

Indeed, as all cautionary obligations are in their nature voluntary, it should seem, that they cannot be imposed on an heir without his consent.

Answered: In this case, the representatives are expressly bound, as well as the cautioners themselves. The import of this obligation is
best

best explained by the universal practice in similar instances; as, for example, that of messengers, the heirs of whose cautioners are always understood to continue bound. Nor does the case of banking houses afford any real exception; for if, on the death of a cautioner for a cash-credit, it be their custom to require a new one, this is only for the sake of summary execution, which cannot take place against heirs.

“ The Lords repelled the defence pled for the representatives of the
 “ deceased cautioners, of their not being liable for any intromissions
 “ of the factor subsequent to the death of the said cautioners, and
 “ found the cautionary obligation to be equally effectual against them
 “ as the Earl of Selkirk, the only original cautioner now in life.”

A reclaiming petition against this judgement was refused without answers.

Reporter, Lord Swinton.

A.C. Rolland, Jo. Millar.

Alt. Wight.

Clerk, Menzies.

S.

N^o CLII.

November 30. 1790.

MAGISTRATES of PAISLEY and JOHN ADAM.

JURISDICTION.—Horning competent to pass on the extracted decrees of the Magistrates of boroughs of barony or of regality, or on protests and other writings registered in their court-books.

A BILL of exchange having been protested at the instance of Adam, and the protest registered in the court-books of the borough of Paisley; on this registered protest a bill of horning was presented. In consequence of a doubt concerning its competency, started by the clerk of the bills, in respect that Paisley was not a royal borough, the Lord Ordinary “ appointed the complainer to give in a short memorial, distinctly stating the nature and constitution of the borough of Paisley, and in what respect horning is competent to pass

4 H

“ upon

“ upon the extracted decrees of its magistrates, or on protests or other writings registered in the books of that borough.”

Upon this, the Magistrates listed themselves as parties in support of their jurisdiction, and gave in the memorial required by the Lord Ordinary; who afterwards ordered them to prepare a memorial to the Court in order to report. In this it was

Pleaded: The town of Paisley was erected into a borough of barony by a charter of King James IV. in 1488; and afterwards, the superiority of it was obtained by the council and community, by whom it is held of the Crown.

The Magistrates have constantly exercised jurisdiction both civil and criminal, with every privilege of a royal borough, except that of sending a representative to parliament; a jurisdiction which has been uniformly recognised by the supreme courts. In particular, a large number of hornings and captions on their decrees, from the year 1742 downwards, has been exhibited. That it was a legal and competent jurisdiction will appear on examination.

The letters of *four forms*, which had been confined originally to obligations *ad facta præstanda*, were extended to decrees for liquid sums, by act of sederunt 23d March 1582, ratified by act of parliament 1584, c. 139. This statute authorises execution, for liquid sums, “ of decreets given, or to be given, by the Lords of Session, and sick-like of decreets given, or to be given, by *whatsoever judges* within his Majesty’s realm, whereunto the authority of the said Lords of Session has been, or shall happen to be interponed;” reference being here made to *decreets or letters conform*, so well known in our ancient law. Hence it is evident that this personal execution was appointed to issue, upon the decrees of all courts of established jurisdiction, whether superior or inferior.

Afterwards, execution by horning on a single charge, came to be introduced in some particular instances; and it was usual to insert in obligations for borrowed money, a stipulation to that effect. Then followed the statute 1592, c. 181. which, in order to avoid the expence of the *letters conform*, ordains the Lords of Session to “ direct letters of horning on all decreets and acts given by provosts and bailies of boroughs *inter con-cives*.” Here the term “ boroughs” plainly comprehends all boroughs, whether those of barony, those of regality, or royal boroughs; and it is so understood by Sir George Mackenzie in his Observations, who employs the corresponding general expression of “ towns.”

In like manner the subsequent act of 1606, c. 10. which confers the same privilege of execution by horning, on decrees of sheriffs, &c. states it, in the like general terms, as ordained by the former statute, to pass on “ decreets, acts, and sentences, of provosts and bailies with- in burgh.”

As the terms are general, so there is the same reason for extending execution by horning, to the decrees of the magistrates of boroughs of barony as of regality, or of royal boroughs. If decreets *conform*, and letters of *four forms*, were competent upon the decrees of *whatsoever*

ever judges, or of the magistrates of boroughs of barony, there is surely no reason why diligence by horning, which was a mere substitute for the former more inconvenient mode, should not be equally competent.

In the present case this conclusion is confirmed by the inveterate and immemorial usage respecting the borough in question; and it is a practice founded in the highest expediency; as the jurisdiction of the magistrates must otherwise have been rendered nugatory, as often as a party chose to pass over the bounds of their territory.

On advising this memorial, and the report of the cause, the Court paid attention to the inveterate usage; but at the same time they seemed to consider boroughs of barony, or of regality, as differing little or nothing, in point of jurisdiction, from royal boroughs. It was also noticed, that the borough of Paisley, instead of a subject superior, holds of the Crown.

The Lords therefore sustained the jurisdiction in question.

Reporter, Lord Dregburn.

Adv. Cullen.

S.

Nº CLIII.

November 30. 1790.

JOHN HARRISON OLIPHANT,

AGAINST

DAVID SMYTH.

BONA FIDE CONSUMPTION—Of Teinds.—*Whether a sum decerned for as the amount of bygone teind-duties, be regarded as fructus bona fide percepti, either as to principal or annualrents.*

IN 1750, the predecessor of Mr Smyth obtained a decree against the predecessor of Mr Oliphant, for payment to him, as titular, of the teind-duties of the lands of the latter, for thirty-nine years preceding; and then deduced an adjudication against the estate for the amount, being a considerable sum.

Many years afterwards, during which period Mr Smyth continued in possession of the teinds, Mr Oliphant, in consequence of the recovery

very of title-deeds, shewing his right to them, prevailed in an action of reduction of the above-mentioned decrees, for payment, and of adjudication.

It came then to be a question, how far the possession on the part of Mr Smyth, which was admitted to have been *bona fide* held, could avail him; whether the whole sum of arrears understood as *fructus percepti*, or at least the annualrents of that sum as accumulated in the adjudication, should be found to belong to him; or if he was to retain only the teind-duties subsequent to the decree in his favour, which he had levied.

The Lord Ordinary “sustained the defence of *bona fide* possession with regard to all bygones antecedent to the date of the first interlocutor in the process of reduction.”

This interlocutor having been brought under the review of the Court by petition and answers, it was

Observed on the Bench: Mr Smyth, prior to 1750, not being in possession, the bygone teind-duties then found due to him, are to be considered as one individual debt. But the *condictio indebiti*, as the present action really is, admits no claim for annualrents as *bona fide percepta*, repetition of interest not being less due than of the principal.

“The Lords found Mr Smyth not intitled to retain the interest of the accumulated sum contained in the adjudication for the bygone teind-duties previous to the decret 1750; and found, That the point respecting the accumulate sum in the adjudication is a *res hac tenus judicata*, by the final interlocutor of the Court, setting aside both the adjudication and the decret upon which it proceeded; and that the *bona fides* of Mr Smyth was interrupted from the date of the citation to this action; but found, That the defence of *bona fides* is applicable to the teind-duties uplifted by Mr Smyth from the date of the decret 1750 to the date of citation to this action.”

In a reclaiming petition, it was endeavoured to shew, by the following authorities from the Civil law, and from the law of Scotland, that a *bona fide possessor* is not bound to restore the interest of money *indebite solutum*, any more than the natural fruits of other subjects, l. 48. ff. de acquir. rer. dom.: l. 19. de her. pet.; l. 34. de usur.; l. 88. § ult. ad leg. Falc.; l. 1. Cod. de condict. indeb.; Voet. ad eund. tit. § 12. Erskine, b. 2. tit. 2. § 26. Dict. voc. Annualrent.

But this petition was refused without answers.

Lord Ordinary, Gardenston.

A&. Hay.

Alt. Rolland.

Clerk, Colquhoun.

S.

N° CLIV.

N^o CLIV.

December 8. 1790.

The TRUSTEES of JANE MARCHIONESS of Lothian,

A G A I N S T

WILLIAM SIMPSON.

COMPENSATION AND RETENTION.—SUPERIOR AND VASSAL.—

A vassal how far authorised to retain feu-duties for damages occasioned by the working of a coal originally reserved to the superior, but afterwards sold by him.

IN 1748, the father of Mr Simpson obtained, from George Lord Roß, a feu-right of the lands of Pittendriech. The feu-duties were of considerable extent, amounting nearly to L. 150.

In the feu-right the following reservation appeared:

“ But reserving to us, and our heirs and assignees, all and singular
 “ mines of gold, silver, copper, lead, coal, and other metals and minerals whatever, quarries of stone and lime only excepted, which
 “ are within the grounds of the lands before disposed, or any part
 “ thereof; and full power and liberty to us and our forefairs, now
 “ and at all times hereafter, to search for, work out, and dispose of
 “ to our own use, all such metals and minerals, excepting stone and
 “ lime, as said is; and to make use of such part of the lands before
 “ disposed as shall be necessary for these ends; we and our forefairs
 “ always satisfying and paying the whole damages which the said
 “ Andrew Simpson and his forefairs shall sustain thereby, according
 “ as such damages shall be ascertained by two indifferent persons, of
 “ whom one to be chosen by us and forefairs, and the other by the
 “ said Andrew Simpson and his forefairs, as arbiters, or by an over-
 “ man to be chosen by the said arbiters.”

At the time when the feu-right was granted, and for several years after it, the coal was let by Lord Roß to tacksmen, with whom Mr Simpson's father settled his claim of damages in the manner prescribed.

The superiority of the lands, with the benefit of the reservation as to the minerals, having been transferred by Lord Roß to the late Marquis of Lothian, he, by his marriage-articles, provided his wife in a liferent of the whole.

Afterwards, with the consent of his Lady, the Marquis sold the coal to be found in these lands, to Mr Clerk of Eldin, under the same obligation as to damages that had been inserted in the original feu-contract.

The conveyance in favour of Mr Clerk was in the form of a subaltern infeftment, Mr Clerk paying, in name of blench-duty, one penny Sterling, *si petatur tantum*.

Between Mr Clerk and Mr Simpson's father several settlements took place with regard to the damages occasioned by the working of the coal. But in 1764, the parties having differed, a litigation ensued; which, in 1784, terminated in a decree of the Court of Session, by which Mr Clerk was found liable in damages and expenses.

Two years before this, however, Mr Simpson, his father being then dead, resolved to retain the feu-duties payable by him to the Marchioness of Lothian in virtue of her liferent-right, until the damages already ascertained, as well as those in the course of liquidation, were made good. These last, he alledged, would be very great, the ground on which his mansion-house and offices stood having been in some degree undermined.

An action for the feu-duties having been brought in 1788 against Mr Simpson, by certain trustees appointed by the Marchioness of Lothian, he, in defence,

Pleaded: By the original feu-contract, Lord Rofs became bound to repair the damages that might be sustained by the feuer in working the coal. This was an essential part of the agreement; and the right of levying the feu-duties could not be exercised unless it was duly fulfilled.

When Lord Rofs transferred his right of superiority, including that of working the coal, to the Marquis of Lothian, he at the same time communicated the burden originally annexed to it. Neither the Marquis himself, nor those who, in the character of lessees or feuers, had an authority from him, more or less permanent, could reap the benefit thence arising, without being subjected to the obligation of repairing the damages, the rule in all such cases being, "*Qui facit per alium, facit per se*."

And the Marchioness of Lothian, in virtue of her liferent-right, as well as her trustees, must stand precisely in the same situation. The obligation to pay the feu-duties, and that of securing an indemnification to the feuer for the losses arising from working the coal, are counter parts of each other; and he who demands that the obligations incumbent on the feuer shall be performed, must show that there has been no delay in discharging those which the latter may lawfully require.

An absolute and unconditional transfer of the coal could not, without the consent of the feuer, relieve the superior from his engagements. A power of assigning in no instance is held to sanction such a proceeding. Thus, in the case of a lease, which is only distinguishable from a feu by the endurance of the right, the original lessee, even after an assignment, continues bound to the landlord. Erskine, 2. 6. 35.; Bank. 2. 9. 14. In the present case, however, there is no room for any reasoning of that sort; the right of working the coal, notwithstanding the subaltern infeftment, still remain-
ing

ing attached to the superiority. Indeed the two rights are inseparable, as it is not in the power of a superior, by any deed not consented to by the vassal, to parcel out his right of superiority; 2d December 1774, Middleton *contra* Earl of Dunmore; 21st January 1781, Sir James Colquhoun *contra* the Duke of Montrose.

In the case of a reserved right of working a coal, an unlimited power of devolving on others the obligation to pay damages, would be singularly unjust. After repeated transmissions of that right, it would be impossible to ascertain in what manner the damages were to be made up by each successive owner of the coal; and after the coal was exhausted, there would be no opportunity of recovering damages, although the extent cannot be previously known or ascertained; so that, thus it might be in the power of the superior to obtain a decree of irritancy, *ob non solutum canonem*, when the vassal, in consequence of proceedings authorised by the superior himself, had been disabled from relieving his property. To these hardships it cannot be supposed, that it was in the view of the parties to subject the vassal; and there is nothing in the subsequent transactions that can authorise such a presumption. The purchaser of the coal having become bound to indemnify the feuer, it was natural that the feuer should, in the first place, endeavour to obtain his reparation from him: but from this it were unreasonable to infer, that the superior was released from his engagements.

Answered: The right of working a coal is not a part of the *dominium directum*, or superiority of the lands containing that mineral; otherwise the reservation which occurs in the feu-contract would have been unnecessary. It is a part of the *dominium utile*, and may be separated from the remaining parts, in the same manner as any one portion of the lands may be separated from another.

If both the right of superiority and that of working the coal had been conveyed away, it is evident, the obligation of indemnifying the feuer would have been transferred to the purchaser; in the same manner as the vassal, by selling the feu-lands, might have relieved himself from the future payment of the feu-duties. Nor can it make any difference, that in this instance the right of working the coal only has been sold, while the right of superiority is retained, those two estates, though once vested in one and the same person, being quite separate and independent of each other; and as it is the owner of the coal only who reaps any benefit from it, it is just that he alone should bear the correspondent burdens.

The intention of the parties in this case is sufficiently evident. The manner of ascertaining the damages as prescribed by the feu-contract, as well as the various settlements and litigations which have ensued, to which the superior was no party, clearly show, that after the right of working the coal was transferred to another, he was to be no longer concerned in it. Such a transfer has already been made; the conveyance in favour of the purchaser of the coal, though in the form of a subaltern investment, completely divesting the superior, who,

who, after the date of the sale, retained no authority over the coal, or the owner of it. To suppose, in such circumstances as these, that the feuer, instead of recovering the damages, as they occurred, from the party occasioning them, should have a power of throwing the loss on the superior; or that, under the colour of a security, he should have an opportunity of retaining those feu-duties which are due for the use of the lands; would be extremely unreasonable and unjust.

The Lord Ordinary, both on the general ground, and in respect of the specialties, found that Mr Simpson had no right to retain the feu-duties.

After advising a reclaiming petition, which was followed with answers, Mr Simpson having waved his claim of retention as to the damages already liquidated,

“ The Lords altered the Lord Ordinary’s interlocutor, and found, “ that Mr Simpson was intitled to retain the feu-duties stipulated in “ the original feu-contract entered into with Lord Ross, in security “ of any damage which he has sustained, or may sustain, by the re- “ fervation in that contract, of working the coal in Mr Simpson’s “ lands subsequent to the period when the damages were liquidated “ and awarded against Mr Clerk.”

A reclaiming petition was preferred for the trustees of the Marchioness of Lothian, and answers were given in for Mr Simpson, after which a hearing in presence took place.

The Lords altered their former interlocutor, thus returning to that which had been pronounced by the Lord Ordinary.

Mr Simpson reclaimed; but the petition was refused without answers.

Lord Ordinary, *Dreghern.*
Mat. Ross, Maconochie.

Act. Solicitor-General, Tait.
Gordon, Clerk.

Alt. Dean of Faculty.

C.

CLV.

N^o CLV.

December 8. 1790.

MARK PRINGLE,

A G A I N S T

FREEHOLDERS of ROXBURGHSHIRE.

MEMBER OF PARLIAMENT : Act 16. Geo. II. *Other means than the trust-oath, for ascertaining the objection of nominal and fictitious, precluded by the lapse of four months after inrolment.*

BY act 16th Geo. II. relative to the election of members of parliament, it is declared, that if no complaint against the title of any person inrolled as a freeholder be exhibited to the Court of Session “*within four kalendar months after inrolment, the freeholder inrolled shall stand and continue upon the roll, until an alteration of his circumstances be allowed by the freeholders, at a subsequent Michaelmas meeting or meeting for election, as a sufficient cause for striking or leaving him out of the roll.*”

It still, however, continued competent to put to every freeholder the oath of trust and possession, introduced by act 7th Geo. II. at any time before he proceeded to vote in the election of a member of parliament, or in adjusting the rolls.

In the case of the freeholders of Forfarshire, in 1768, the Court found, that in order to ascertain whether or not the qualifications of freeholders were nominal and fictitious, they should be likewise obliged to answer special interrogatories on the subject. But, upon an appeal, the House of Lords reversed that judgement, finding that the Court had no power to enter into such an investigation.

This was afterwards held to be the rule, down to the date of the decision in the case of Sir John Macpherson*. That judgement, however, being brought under the review of the House of Peers, it was then found, that the trust-oath was not the only means of investigating the merits of the objection of *nominal and fictitious*, but that it was competent to do so *prout de jure*; and in particular, by calling on the party to answer pertinent interrogatories.

As the trust-oath and the other modes of investigation, seemed to be thus connected together as co-ordinate means to the same end, an opinion began to prevail, that as the former might be employed at any

* 6th March 1783, p. 121. *supra*.

time, notwithstanding the enactment relative to the *four months*, so also might the latter.

Accordingly, at a meeting of the freeholders of Roxburghshire in July 1790, for the election of a member of parliament, Mr Pringle, upon his declining to answer certain questions relative to his qualification, was struck off the roll; although he had stood upon it for several years, without undergoing *any change of his circumstances*.

In consequence of this, he presented a petition and complaint to the Court; when

It seemed to be considered, that the statute 16th Geo. II. being the sole authority, under which the Court exercised jurisdiction in matters of that kind, they were of necessity to be governed by the limitation therein prescribed.

The Lords therefore found, That the freeholders had done wrong, and that Mr Pringle ought to be restored to his place in their roll.

Adv. Abercromby, Tait.

Adv. Dean of Faculty, W. Robertson.

S.

N° CLVI.

December 8. 1790.

The Honourable JAMES ERSKINE,

AGAINST

ROBERT GRAHAM.

MEMBER OF PARLIAMENT.—*A superior of lands obtaining a charter of resignation in favour of another person in liferent, and of himself in fee, may, nevertheless, claim enrolment as a freeholder in virtue of his former investitures.*

MR JAMES ERSKINE of Alva, one of the Senators of the College of Justice, being superior of certain lands in the county of Stirling affording a freehold qualification, conveyed to relation of his a liferent of the superiority; and a charter of resignation was obtained from

from the Crown, in favour of that person in liferent, and of his Lordship in fee.

When this transaction took place, Lord Alva was inrolled among the freeholders of the county of Stirling, as proprietor of certain lands, which he afterwards sold. At the meeting, therefore, for electing a member of parliament on 6th July 1790, he claimed inrolment, as superior of the lands first mentioned; and for that purpose he produced his investitures, which had been completed before the giving away of the liferent-right.

To this claim it was objected by Mr Graham, one of the freeholders, that, by the resignation, the former investitures had been completely done away, and could not be the warrant of an inrolment. This objection was sustained by the freeholders.

But, after advising a petition and complaint for Lord Alva, which was followed with answers, replies, and duplies, the Court being clearly of opinion, that a charter of resignation in favour of the resigner himself, though burdened with a liferent in favour of another person, did not invalidate a claim of inrolment, founded on the former investitures,

The Lords found, That the freeholders had done wrong in not admitting Lord Alva, &c. and found expences due.

Act. Abercromby.

Alt. W. Robertson, et alii.

C.

Nota, Before these proceedings, the liferenter had executed a renunciation of his right, and Lord Alva had obtained a new charter. This, however, he not being able to produce, but only an extract of it, the determination of the Court entirely rested on the validity of his original titles.

N° CLVII.

December 8. 1790.

JAMES FARQUHAR-GORDON, and his CURATORS,

AGAINST

The TRUSTEES of the late JOHN GORDON.

FIAR ABSOLUTE—LIMITED.—*The powers of a father over lands provided to the heir of a marriage.*

THE late John Gordon, by his marriage-articles, became bound “to provide and secure the lands and estate of Balmuir, and others particularly mentioned, to himself and the sons of his intended marriage *seriatim*, and the heirs whomsoever of their bodies; whom failing, to the sons *seriatim* of the said John Gordon in any subsequent marriage, and the heirs whomsoever of their bodies; whom failing, to the daughters *seriatim* of the marriage, and the heirs whomsoever of their marriage; whom failing, to the daughters of the said John Gordon by any subsequent marriage, and the heirs whomsoever of their bodies; whom failing, &c. the eldest daughter or heir-female always succeeding without division, and excluding all heirs-portioners.”

Mr Gordon reserved to himself a power of preferring any of the younger sons of the marriage to the eldest; or in case of there being no sons, any of the younger daughters to their eldest sister, and to make substitutions of one of the sons to another, and of any of the daughters to the rest; and also to impose on all or any of the heirs, whether male or female, such conditions and limitations against contracting debt, or alienation of the lands, and with regard to bearing and using the names and arms of the family, as he should think fit; and to enforce such conditions and limitations, by clauses prohibitory, irritant, and resolute. Certain sums were provided to the other children, L. 1500 being given, if there were three or more children. And a jointure of L. 100 was provided for the widow.

Mr Gordon, beside the landed estate falling under the marriage-articles, which yielded about L. 200 per annum, was possessed of effects, heritable and moveable, to the extent of L. 13,000. Having twelve children, he conveyed his whole property to trustees, with directions to sell the lands, and to divide the proceeds, along with his other funds, among his children, the two eldest being to have L. 200 more than the rest.

After Mr Gordon's death, the curators of his eldest son, James Farquhar-Gordon, considering this settlement, so far as respected the
lands

lands falling under the marriage-articles, to be *ultra vires*, brought an action for setting it aside. In bar of this action, it was

Pleaded: After the execution of the marriage-articles, Mr Gordon remained the absolute proprietor of the lands falling under them. His power of selling them is indisputable; and his authority in making such a distribution of them as appeared to be necessary for the exigencies of his family, is equally so. As he might have altogether excluded his eldest son from inheriting his landed property, and restricted him to a rateable share of the sum of L. 1500, the settlement actually made cannot be thought liable to challenge. In some cases, the entire exclusion of the eldest son of a marriage, on account of his particular situation, has received the sanction of our courts; and although, in a later instance, the creditors of the eldest son were successful in setting aside a settlement of the same kind, as made in defraud of their just claims, that decision cannot affect the present question; Erskine, book 3. tit. 8. § 39.

Answered: By the marriage-articles, the eldest son, unless in the particular events therein provided, was intitled to claim the lands then belonging to his father. It is true, that his claim so far partook of the nature of a right of succession, that his father's onerous creditors would have been preferred to him. But from thence it does not follow, that the father, by a voluntary deed, could entirely frustrate the purposes of those who were parties to the agreement, and who evidently meant to establish a representation of the family in one or other of the sons of the marriage; and although the father had a power of preferring one of his younger sons to the eldest, *quod potuit non fecit*. As to the decisions referred to on the other side, they have been justly considered as extending to an unreasonable length a father's authority over his children, and therefore have never been followed as precedents; Erskine, book 3. tit. 8. § 38.; 28th July 1778, Spiers *contra* Dunlop and others.

The Lords sustained the reasons of reduction.

Reporter, Lord Esqgrave.

A&T. Rolland.

Alt. Abercromby.

Clerk, Mitchellson.

C.

N° CLVIII.

December 8. 1790.

ELISABETH CUMING,

A G A I N S T

The YORK-BUILDINGS COMPANY.

PREScription.—Negative prescription of forty years.—*Minority of one of several nearest in kin, how far it prevents the currency of prescription.*

THE father of Elisabeth Cuming was assignee in several petty debts due by the York-Buildings Company, for which, in the year 1734, he obtained a decree.

No farther steps, however, were taken; and Mr Cuming died in 1746, leaving two sons and four daughters, of whom Elisabeth, born in 1744, was the youngest.

It was not till 1787 that Elisabeth Cuming, having been confirmed sole executor *qua* nearest in kin to her father, obtained a decree of adjudication for these debts, against the York-Buildings Company's estates in Scotland.

In the ranking of the creditors, it was admitted, that, on account of the minority of Elisabeth Cuming, no prescription could be pleaded against her; but as to the other children, it was maintained, that the debt was extinguished. In opposition to this argument Elisabeth Cuming

Pleaded: The statutes introducing the negative prescription seem to apply only to obligations and contracts, and not to decrees. With respect to them, the danger of forgery, which appears to have been chiefly in the view of the legislature, is altogether precluded; Acts 1469, c. 28; 1474, c. 54.; 1617, c. 12.

But it would be of no importance, although these enactments were to be so extended as to reach judicial proceedings. In the case of rights descending to an heir, who, in the contemplation of law, is held to be *eadem persona cum defuncto*, every objection which is pleadable against the ancestor may be thought competent against him. But an executor, who is truly a trustee, appointed for collecting and distributing the moveable effects of a deceased person, stands in a different situation; and if it can be shown that no improper delay is imputable to him, the objection of prescription must be wholly excluded.

So

So the point was determined, 26th June 1756, The younger children of Sir Samuel Maclellan. Indeed, where the executor confirmed is one of the nearest in kin, it cannot be said, until the rest enter their claim, that any right is vested in them. In case of their dying without issue, the whole succession would remain with the executor confirmed.

Answered : It is to the right of debt or obligation that the long prescription is applied, without any regard to the form in which it is constituted. A decree, therefore, on which no proceedings have been held for forty years, becomes ineffectual, in the same manner as if the claim giving rise to it had never existed.

If, in the present case, the right of debt had been vested in the executor confirmed, before the years of prescription had been completed, there might have been room for arguing, on the authority of the decision quoted on the other side, that the claim was still unimpaired, the person having the *jus exigendi* being so long under a legal disability. But one of several nearest in kin cannot, by confirming, communicate to the rest the privilege of her minority.

But the principle of the decision in 1756 has been departed from in several later instances ; it being now more justly held, that it is not the minority of the trustee, but that of those who are to reap the benefit of the trust, by which every question of this kind ought to be regulated. And, as in virtue of even a partial confirmation obtained by one of many nearest in kin, the whole moveable estate is transmitted in succession, it does not seem to admit of dispute, that the shares belonging to every one of the nearest in kin having been previously divided by the operation of the law, must run a separate course of prescription, in the same manner as if the debtor had come under so many separate obligations.

The Lord Ordinary repelled the plea of prescription.

But after advising a reclaiming petition, with answers,

The Court altered that interlocutor, and found, “ That the minority of Elisabeth Cuming can only save from the negative prescription her own proper interest and share of the debt that is now claimed, and that of such of her brothers and sisters as could have pleaded their minorities when she produced her claim.”

Lord Ordinary, *Monteddo*.

Adv. *Wolfe Murray*.

Adv. *Honyman*.

Clerk, *Colquhoun*.

C.

N^o CLIX.

December 14. 1790.

SIR ALEXANDER CAMPBELL, Baronet,

AGAINST

PETER SPIERS.

MEMBER OF PARLIAMENT.—*Valued Rent.*—*Objection, that two parcels of lands, separately valued, had been thrown together by the Commissioners, how far sustained after acquiescence for many years.—The execution of a trust-deed does not disqualify a freeholder.—What possession necessary for an apparent heir claiming inrolment.*

IN the original books of valuation in the county of Stirling, the lands of Gargunnock were rated, *in cumulo*, at L. 863 : 18 : 8.

In 1740, the commissioners of supply disjoined the valuation of the lands of Fleuchames and Redmains, parts of the estate of Gargunnock, from that of the remainder, declaring it to be L. 108.

In 1753, the proprietor of this estate again applied to the commissioners of supply, for a division of the valued rent of the whole lands of Gargunnock. At this time, no notice being taken of the previous division made thirteen years before, the lands were thrown together, and divided according to the real rents : And in this division all parties acquiesced, Sir James Campbell the proprietor, and several other persons, having been, in virtue of it, admitted to the roll of freeholders.

In 1787, Sir James Campbell executed a trust-settlement of his estates, the purpose of which was, “to make provision for the payment of his debts, and for laying down a proper plan for the management of his estates, in the event of his decease before the debts were cleared off.”

The trustees were authorised to enter into possession, to apply the produce of the lands towards the payment of the debts, one half, however, being appropriated to the maintenance of the heir, and to sell so much of the lands as was necessary ; and after the purposes of the trust were accomplished, the trustees were to denude in favour of certain heirs of entail named by Sir James Campbell.

The trust-deed containing a procuratory of resignation and a precept of feisin, the trustees, after the death of Sir James Campbell, in 1788, took a base intestment ; and they entered into possession, by levying the rents, &c.

But

But in April 1790 they executed a deed, renouncing the procuratory of resignation, and agreeing to hold the lands of Sir Alexander Campbell, the truster's eldest son, and heir of entail.

At the meeting for electing a member of parliament for the county of Stirling, on 6th July 1790, Sir Alexander Campbell claimed inrolment as apparent heir of his father. Three objections were stated by Mr Spiers, a freeholder then present, 1st, That by the trust-deed the right of Sir James Campbell and his heirs became defeasible at the will of other persons, and consequently ceased to give a right to vote; 2^{dly}, That those apparent heirs only could be inrolled as freeholders who were *in possession* of the lands which had belonged to the ancestor; and 3^{dly}, That the decree of division in 1753, on which Sir James had been inrolled, was void and null, the commissioners of supply having blended two estates which had formerly been separately valued.

These objections having been sustained by the freeholders, Sir Alexander Campbell complained to the Court of Session; when, in support of the objections, Mr Spiers

Pleaded: 1. It was in the power of the trustees appointed by Sir James Campbell, by executing the procuratory of resignation, or by selling the lands, to divest him entirely of his estates; and therefore it would be equally contrary to the purity and independence of our parliamentary representation, if a person so situated, or his heir, were to be admitted to vote. The deed executed by the trustees after the death of Sir James Campbell, whereby they became bound not to execute the procuratory of resignation, is of no importance, as it could be no hindrance to a purchase from the trustees. And so the Court seems to have decided, 7th March 1781, Macadam *contra* the Freeholders of Ayrshire; 15th May 1789, Williamson *contra* Smith.

2. Although the freehold-qualification in the person of Sir James Campbell had been liable to no objection, it would not follow, that the claim offered by his son should be sustained. By act 1681, it is indeed declared, that apparent heirs may be admitted in virtue of their predecessors' investment, if of the holding, extent, and valuation required by law. This privilege, however, is not indiscriminately given to all apparent heirs, but is confined to those *who are in possession*; a requisite which does not here occur, the trustees named by Sir James Campbell still continuing to levy the rents.

3. There is no evidence that the lands which belonged to Sir James Campbell are of the valuation required by law. The decree of division in 1753 is, *ex facie*, irregular. Instead of setting apart L. 108 as the valuation of the lands of Fleuchames and Redmains, and then proceeding to a division of the remaining valuation among the other lands contained in the original *cumulo*, amounting to L. 755 : 18 : 8, the commissioners took it upon them to blend two parcels of lands which stood separately valued; a proceeding wholly unauthorised. As this objection appears from the books of valuation, it might be stated, without any action for setting aside the decree; 19th January

1781, Sir John Scott and others *contra* Robert Trotter; 16th February 1787, John Boyes *contra* Freeholders of Renfrewshire.

It is of no consequence, that the decree of division has hitherto remained unchallenged, the land-tax for the whole lands having been paid by Sir James Campbell, or his trustees. If a contrary argument were to be listened to, a division at an unauthorized meeting of the commissioners, or made by private agreement, might be sustained in opposition to the established law. And it is of as little importance, that, in making the division, no real injustice has been done; the law having required the valuation of lands in virtue of which an inrolment is claimed, to be quite distinct and separate from that of any other person inrolled as having right to be inrolled as a freeholder.

Answered: 1. A voluntary trust-conveyance, even for the benefit of creditors, has been found no bar to an inrolment, the radical right of property still remaining in the truster; *a fortiori* such a settlement as here occurs cannot be thought to disqualify the person by whom or for whose benefit it is executed. So it was determined, 5th March 1755, Neilson; and also 11th March 1786, Donaldson and others *contra* Sir Ludovick Grant; the intermediate decision in the case of Macadam having been considered as founded on specialties.

2. The objection drawn from the act of 1681 is equally groundless. The statutes relating to elections do in general require, that the party claiming inrolment, or exercising his right of voting after he is inrolled, shall be in possession. But it is not more necessary in the case of an apparent heir, than in that of any other person laying claim to inrolment, that he should be in the natural possession of the lands. In this case, the claimant is virtually in possession, that held by the trustees being his possession.

3. Although the decree of division in 1740 had been given at a meeting regularly called, and upon proper evidence, yet having been so long departed from, and the subsequent decree in 1753 having been acquiesced in by all parties, it could not be resorted to unless in a proper action for setting aside the later decree; 25th June 1780, Shaw Stewart *contra* the Freeholders of Renfrew: Nor would such an action be listened to in a question of inrolment, unless it could be shown, that if the proceedings had been accurately gone through, the freeholder would not have had the requisite valuation. By one decision, it is true, in the case of Trotter, a different rule was followed; but in many others an objection similar to the one here urged has been disregarded; Wight on Elections, Sir Gilbert Elliot *contra* the Freeholders of Roxburghshire, 17th January 1781; Sir John Dalrymple *contra eosdem, eod. die.*

The Court considered the objection arising from the trust-settlement as without any solid foundation. Even although the trustees had obtained a Crown-charter, this, it was observed, would not have precluded the truster, or his heir, from the privilege of voting as a freeholder.

The

The objection relative to Sir Alexander Campbell's claiming as apparent heir, was held to be equally groundless.

As to the decree 1753, the opinion of the Court seemed chiefly to rest on the long silence of all the parties who were entitled to bring it under challenge, it being understood, that as the prior decree was sufficiently regular, it was competent, without any process of reduction, to challenge the subsequent one, in which it was disregarded.

After advising a petition and complaint for Sir Alexander Campbell, which was followed with answers, replies, and duplies,

The Lords found, That the freeholders did wrong in not admitting Sir Alexander Campbell to the roll of electors.

A reclaiming petition was preferred. The arguments in it were entirely confined to the validity of the decree of valuation in 1753; but it was refused without answers.

A&S. *Solicitor-General, et alii.*

Alt. *Dean of Faculty, Wight, et alii.*

Clerk, *Home.*

C.

N^o CLX

December 22. 1790.

ILAY FERRIER,

AGAINST

WILLIAM MOREHEAD.

MEMBER OF PARLIAMENT.—TRUST.—Act 1696, cap. 25.—*How far applicable in questions respecting freehold-claims.*

MR FERRIER claimed inrolment, as a freeholder in the county of Stirling, at the meeting for election on 6th July 1790, as life-rent-superior of certain lands which were of the requisite valuation.

Mr Morehead objected to the claim, on the ground of the titles being nominal and confidential; and the freeholders having refused to inrol, Mr Ferrier complained to the Court of Session.

In

In addition to the questionable nature of Mr Ferrier's right, as appearing from the writings exhibited by him, Mr Morehead offered a proof *prout de jure* of the fact of nominality and confidence, including the parole-evidence of the different persons who had been concerned in the business.

Mr Ferrier, on the other hand, contended, that the admission of oral testimony in such a case was contrary to the statute of 1696, whereby it is declared, "That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust, lawfully subscribed by the person alledged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*." In support of this objection, he

Pleaded: The general rule certainly is, that solemn writings respecting landed property cannot be set aside by parole-testimony. So the law stood before the enactment of 1696, which only corrected an error in the construction of trust-rights, which had acquired some footing. In a question, therefore, with the granter of the life-right here founded on, no evidence but the oath or writing of the liferenter could be listened to; and it is not easy to figure in what manner other parties, not immediately interested, can be allowed a more extensive range. It is true, that by the enactment of 7th George II. it is in the power of the freeholders to try, by the oath of any party claiming involvement, whether his qualification is an independent one, or held in trust for another person; but this particular interposition of the legislature serves only to strengthen the general rule.

Answered: By the statute of 1696, it was provided, in affirmance of the common law, that trust in a question between the granter and grantee should only be proved by the oath or writing of the party. But from this it does not follow, that in every case the same method of proof must be adhered to. Thus, in a question between the creditors of a bankrupt, and a person to whom he has conveyed landed property, if the conveyance be objected to as fraudulent, or designed for the benefit of the bankrupt himself, parole-testimony is admitted. In this case, however, the objection being not merely that the right is confidential, but that it is nominal, intended to convey to the grantee the shadow only, and not the substance of a right, the regulation of the act 1696 is as inapplicable as it would be where an objection of forgery is made.

After hearing counsel, the Court had no difficulty in allowing the proof here offered.

A&S. Solicitor-General. Ross, et alii.
Clerk, Home.

Alt. Dean of Faculty, Wight, et alii.

C.

Nota. The same decision was given at the same time in a similar case, Morehead *contra* Cheap.

N^o CLXI.

January 15. 1791.

JAMES DENNISTON,

AGAINST

WILLIAM HARKNESS.

PERICULUM.—NAUTÆ CAUPONES ET STABULARII.—*A common carrier between Glasgow and Carlisle having undertaken the conveyance of goods intended for Manchester, found not liable for the loss of the goods between Carlisle and Manchester.*

JAMES DENNISTON of Glasgow, delivered a parcel of goods to William Harkness, a common carrier between Glasgow and Carlisle.

The parcel was addressed to Nathaniel Workington, at Oldham, near Manchester; and so it was described in Harkness's way-book.

Upon his arrival at Carlisle, Harkness delivered the parcel to Jonathan Wilson, a common carrier between Carlisle and Manchester, after receiving from him 8*d.* as due for the carriage between Glasgow and Carlisle. He also saw the parcel marked in Wilson's way-book.

The parcel having been lost in its progress between Carlisle and Manchester, Denniston brought an action for the value against Harkness, as having undertaken the charge of it to the place of its destination.

In support of the action, Denniston examined several respectable merchants and carriers, who swore, that according to the general understanding of people engaged in the trade, the defender was liable; and

Pleaded: By the entry in the carrier's way-book, describing the parcel as deliverable at Manchester, he clearly explained the nature and extent of his engagement: nor is this obviated by the circumstance of his terminating his own journey at a place not so far distant. Having the choice of the person to whom, on his arrival at Carlisle, the parcel was to be intrusted, his situation was the same, as if the parcel had still remained under his immediate care. This species of warranty, which, from the reciprocity of it among carriers, can be attended with little loss to them, is absolutely necessary for

the safety of inland commerce ; and it appears from the evidence to be thoroughly understood and followed in practice.

Answered: The entry in the way-book was evidently intended to describe the parcel, and not to extend the obligation of the carrier, in a manner quite inconsistent with the nature of his employment. It would be contrary to all reason, that a carrier of goods between Glasgow and Carlisle should answer for the conduct of another person who is necessarily to have the charge of the goods at an after period ; and the rate of hire received by him, which has no relation either to the length of the road through which the goods are to pass to their ultimate place of destination, or to their intrinsic value, but to their bulk and weight only, combined with the labour of the journey actually performed by him, puts this beyond the possibility of doubt. In the analogous case of goods intrusted to an inn-keeper, warehouseman, or shipmaster, the obligation is confined to the things done *in caupona, navi, vel stabulo*, l. 7. *D. nautæ caup. stab.* Nor will the partial testimony of merchants, or the evidence of a few rival carriers, while no authority is derived from decisions of courts of law, be deemed of sufficient importance to counterbalance the natural import of the agreement between the parties.

Chiefly moved by the evidence, which seemed to go far in showing the understanding of those conversant in the business,

The Lord Ordinary “ Repelled the defences, and found the defender liable.”

But, after advising a reclaiming petition, which was followed with answers,

The Lords altered the Lord Ordinary’s interlocutor, and sustained the defences.

A reclaiming petition was preferred by the pursuer ; but it was refused without answers.

Ordinary, Lord Rockville.

A&S. Rolland, Corbet.

Alt. Cay.

Clerk, Sinclair.

C.

N^o CLXII.

January 22. 1791.

JOHN CAITCHEON,

A G A I N S T

PETER RAMSAY.

PREScription.—Positive Prescription of 40 years.—*Possession by an apparent heir unentered, how far reckoned in the period of prescription.*

THE grandfather of John Caitcheon having been in embarrassed circumstances, a creditor of his, in the year 1713, led an adjudication against some landed property belonging to him. Having obtained a charter of adjudication, the creditor was infest, and immediately entered into possession.

In 1732, the adjudger, without obtaining a decree of expiration of the legal, sold the subjects, as being his undoubted property, to the father of Peter Ramsay; who was immediately infest, and took possession.

After his father's death in 1751, Peter Ramsay entered into possession; but he never made up titles as heir to his father.

In 1764, John Caitcheon, as heir to his grandfather, brought an action for setting aside the rights under which Mr Ramsay held the subjects, on this ground, that before the expiration of the legal, the debt due to the adjudging creditor had been fully paid out of the rents.

If Mr Ramsay, after his father's death in 1751, had made up a feudal title in his person, by service and infestment, it was admitted, that by the long prescription of forty years, he would have been secure; but as he had possessed in the character of apparent heir only, Mr Caitcheon

Pleaded: The benefit of the statute of 1617, c. 12. introducing the positive prescription, belongs only to those "who, along with their
" predecessors and authors, have bruiked heretofore, or shall happen
" to bruik in time coming, by themselves, their tenants, and others
" having their rights, their lands, baronies, annualrents, and other
" heritages, by virtue of their heritable infestments, made to them by
" his Majesty, or others, their superiors or authors, for the space of
" forty years, continually and together, following and ensuing the date of
" their said infestments, and that peaceably and without lawful inter-
" ruption," &c.

In

In a subsequent part of the statute, a distinction is made between the case of heirs and singular successors, as to the nature of the documents necessary for acquiring landed property by prescription, the law requiring in the latter a formal investiture by charter and infeftment preceding the forty years; whereas, in the former, it is sufficient that the party pleading prescription shall produce, as the warrant of his possession, "instruments of seisin, one or more, continued and standing together for the space of forty years, either proceeding upon returns or precepts of *Clare constat*." Still, however, it is required in all cases, that the possession shall be founded on infeftment. With regard to feudal rights, this is no less essential, than possession is in those which do not admit of seisin.

This is the opinion of Mr Erskine, who lays it down, that "possession must, by the statute, be continued throughout the whole course of prescription upon the title of seisins," and that "the possession of an heir, before he has completed his titles, is not reckoned;" Book 2. tit. 7. § 5. And so the point was decided in a case reported by Lord Stair, 15th February 1671, Argyle; where it was found, "That a seisin not having forty years possession by the life and bruiking of the person seised, and never being renewed in his successors, is not a sufficient title of prescription;" Stair, book 2. tit. 12. § 15. Lord Bankton, it should seem, thought that the possession of an apparent heir, "upon his completing his titles," would be available to him in a question of this sort. But although that opinion were better founded than it appears to be, it is inapplicable to the present case. Bankton, book 4. tit. 45. § 163.

Answered: In the first part of the statute of 1617, the legislature defines the nature of the *possession* which is required for establishing a right by the positive prescription. And if it had gone no farther there might have been some reason to doubt, whether possession, unaccompanied with seisins, could be reckoned in filling up the statutory period. But in the following part of the statute, where the nature of the *title* necessary for prescription is described, the meaning of the legislature is quite clear; nothing more being required than that the party pleading prescription shall produce a charter of the lands, with an instrument of seisin preceding the commencement of the forty years possession; or "where there is no charter extant, instruments of seisin, one or more, continued and standing together."

The distinction here made between those whose possession is warranted by a habile title of property, such as a charter and infeftment, and those who, having taken the lands by descent, are not required to produce the warrants of the infeftment on which they found, appears extremely just, when the danger is considered to which these writings are exposed in the transmission of property from the dead to the living. And it may be a question, whether, even in the latter case, it was intended that the possession should, during its whole course, be accompanied with infeftment. But in the former case, unless by Mr Erskine, it does not seem to have been doubted, that possession for forty years, preceded by a complete feudal investiture, is sufficient, whether

whether the infeftment has been regularly renewed in those who are heirs to the person infeft or not.

The passage in Lord Stair does not relate to the case of an heir, but to that of a singular successor. In the decision reported by the same author, the question was, whether or not *one* seisin, proceeding on a precept of *Clare constat*, was a sufficient title of prescription. In a subsequent decision, collected by Edgar, it was found, that "prescription runs by an apparent heir's possession, though not infeft, if the predecessors were infeft in virtue of a charter;" 20th July 1724, Earl of Marchmont *contra* Earl of Home; and a similar judgement was given, 22d December 1774, Middleton *contra* Earl of Dunmore.

It is true, that in those cases the apparent heir had, before the competition, completed his own right by service and infeftment. But that circumstance, of which no notice is taken in the statute, does not seem to make any difference. An infeftment was with propriety required at the commencement of the prescription, it being necessary to show clearly that the party intended to hold the subject as his own; but after he had in that manner published what his purpose was, no reason can be given why the possession of his heir, which can only be ascribed to the same title, should not have the same effect as if he himself had survived the whole space of forty years. The right of possessing the land-estate held by the ancestor, which is one of the privileges of apparenacy, would otherwise be a snare to those in whose favour it was introduced.

Indeed it does not appear why the apparent heir may not at any time, by service, remove such an objection as the present; the rule, *Quod pendente lite nil innovandum*, being applicable only to rights acquired during the litigation from third parties, and not to any thing which one of the litigants may do, by exercising powers that are solely vested in himself; 12th July 1785, Massey *contra* Smith.

The question was reported on memorials, when

The Lords unanimously "sustained the defences."

Reporter, Lord Stonefield.
Clerk, Sinclair.

A&S. Dalzel.

Alt. Sir William Miller.

C.

N° CLXIII.

January 27. 1791.

The CREDITORS of HENRY HARPER,

A G A I N S T

ANDREW FAULDS.

COMPENSATION AND RETENTION.—*Goods in the hands of an artisan or manufacturer cannot be retained by him for any other debt than that of the expence of his manufacture.*

HARPER, a dealer in the linen trade, used to employ Faulds as a bleacher; and at the end of each season accounts were settled between them, for the cloths bleached in the course of it. On one of those occasions Harper granted a bill for L. 105.

In the following season he sent various parcels of linen to this bleachfield, but soon after became bankrupt, his estate being sequestrated, and a trustee over it chosen. The trustee demanded delivery of those goods on payment of the price of bleaching them. This being refused by Faulds, who claimed retention for security of the bill-debt, the trustee brought an action against him, when it was

Pleaded for the defender: One's right of retaining the goods of another, until he shall restore the property of the retainer in his possession, is founded on the first and clearest dictates of justice. It is, however, to be understood, that in the retainer's situation no circumstances have occurred inconsistent with his claim; that his possession is honest and lawful; that he has neither relinquished the claim by express paction; nor is excluded from it by implied compact, as in the cases of deposit and of commodate; nor debarred by any positive law. But if possession has been obtained *hinc inde* in the way of commerce, where, from the nature of the contract, each party is to be entitled to a certain patrimonial benefit, and to make the best advantage he can of his neighbour's property, justice requires that the performance be mutual, while nothing to the contrary is stipulated or implied. And it requires this more especially when, by the insolvency of the party, the denial of retention is the loss of a debt.

Such is the situation of an artist having the goods of other people in his possession for the purpose of manufacture; it being in effect the same, as if he had held that possession for his own benefit, by paying a premium to the owner. This is evident where different artisans have,
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in that way mutually, each others goods in their custody ; in whose case it is clear, at the same time, that there is nothing peculiar.

The above is the doctrine of the Roman law. Without *bonæ fidei* possession,—in the case of deposit,—or in that of *commodatum*, there existed no right of retention ; *Voet. ad lib. 16. tit. 2. § 16. ; ad tit. depof. vel. cont. p. 741. ; l. pen. Cod. lib. 4. tit. 34. ; Id. ad tit. Com. vel. cont. p. 684.* But in all transactions affording mutual benefit, or *quid pro quo*, such as *locatio conductio*, the principle of retention had its full operation. Though the convenience of commerce may dictate the limitation of the right, to cases of the insolvency of owners, yet no such distinction was recognized by the Roman law, which allowed it always, even as a *facilius remedium*.

When, in § 32. *ad tit. de loc. cond.* Voet argues, that a *conductor* cannot retain, he means only as claiming the property against the *locator* ; and if, under that *Title*, he speaks solely of retention for sums expended on the subject, it is because this alone could there fall properly under his consideration. Even, in the case of *pignus*, the Romans admitted the right of retention in its fullest extent ; allowing the pledge to be retained for extraneous debts, not excepting such as were contracted after delivery ; *l. unic. Cod. Etiam ob. chirog. pec. pen. pig. ten. poss. ; Perez. Prælect. in Cod. Justin.* Nor does it derogate from this right, that the retention could not operate against the *secundus creditor*, or him who had the secondary right of pledge ; *Voet. ad tit. Quib. mod. Pig. vel Hyp. solv. § 15.*

Those principles are not less firmly founded in the common law of Scotland, as appears by the best writers ; *Stair, b. 1. tit. 18. § 7. ; Bankton, b. 1. tit. 24. § 34. ; Ersk. b. 3. tit. 4. § 20.* The act of parliament of 1592, instead of introducing, modified and limited the pre-existing right of compensation ; in the same manner as the immediately subsequent act, relative to expences of plea, did with regard to that claim. Nor is it any objection to the opinion of the authors above cited, that they refer to particular instances of retention, these not being stated as limits, but as examples of the right.

The decisions of the Court still more explicitly announce the same doctrine. In the case of *Menzies contra Irving*, retention of a sum due by bill was admitted, on account of a cautionary engagement by the debtor for the creditor ; in which case the caution was surely not incurred in contemplation of the bill-debt, as the bill could be indorced away, and retention would not have been pleadable against the indorsee ; *Fountainhall, 10th July 1710.*

In like manner a mandatary, after the death of the mandant, was found intitled to retention of money, for relief of a cautionary obligation for the debts of the latter ; *Remark. Decif. 19th June 1744, Creditors of Murray contra Chalmer.*

These are palpable instances of the general right of retention, and peculiarly apposite to the case in question. For it is surely not less to be presumed as understood, between a creditor and his debtor who is also cautioner for him, that the debt shall be paid without any claim of retention as cautioner, than that an artist having his employ-
er's

er's goods in his hands to be manufactured, should have agreed to renounce his right of retention for debts, due to him by the employer.

The decisions in the cases of *Lees contra Dinwiddie*, Fountainhall, 10th December 1707, and of *Glendinning contra Montgomery*, Lord Kames's Rem. Decif. 8th June 1745, though perhaps erroneous in sustaining an unlawful possession, are nevertheless strong authorities for the right of retention; as was also the judgement of the House of Lords in the case of *Hewit and Brockhurst*, 6th December 1775. Nor when the *ratio decidendi*, in that of *Leslie contra Hunter*, the very case of a bleacher retaining cloth bleached by him, is attended to, can it be otherwise considered than as a precedent of a similar kind; Fac. Coll. 30th July 1752.

On the same principle alone, rests the acknowledged right of factors to retain the goods of their constituents, in security of all debts whatever due to them by the latter, Dict. of Decif. *voc.* Mutual Contract; Erskine, b. 3. tit. 4. § 21. For on any other ground than that of the general right of retention, a factor's claim could extend no farther, than to retain for payment of factor's fee and of disbursements on the subjects. Even the right of retention, called a writer's hypothec, is another proof of this principle.

Nor in the present case are the creditors of the bankrupt owner placed in a better situation than he himself would have been. They are evidently in one less favourable; for any idea of an anxiety to exclude the right of retention, can hardly be applied to a party who is bankrupt, and without any personal interest in the matter. The bankrupt statutes surely affect not the right of retention more than that of compensation. If the goods by carelessness had been destroyed, the bankrupt would have been creditor for the price, and compensation must have been sustained. But as they are preserved safe, is the claimant's condition on that very account to be rendered worse? And although a fraudulent use might on some occasions be made of such retention, this imperfection is nothing but what is common to all commercial transactions; the remedy of which the law will supply when it becomes necessary, as in all cases where devices are employed *fraudem facere legi*; Fac. Coll. 9th March 1781, *Blackie contra Robertson*; Dict. vol. 3. p. 38. *Sime contra Thomson*. Indeed as a person can neither arrest nor poind goods in his own hands, to deny the right of retention, would make the situation of one possessing the bankrupt's goods, more unfortunate than that of any other creditor.

Though the law of England is of no proper authority in Scotland, it may be noticed that it supports the doctrine of retention; of which Lord Kames gives an instance in *Princ. of Equity*. b. 11. cap. 3. as occurring in the Court of Chancery. And that the same rules prevail there in the other courts, appears from Lord Hardwick's opinion in the case of *Deeze*; *Atkins' Rep.* vol. 1. p. 229. Nor is Lord Mansfield's judgement, in the case of *Green versus Farmer*, different in principle, as is evinced by the reasoning on which it is founded.

Answered:

Answered: The inexpediency of the defender's doctrine, both to the public in general, and to the individual employer, is obvious: To the public, whom by a latent and unknown security it excludes from access to a debtor's property; and to the employer, who may thus be deprived of the most advantageous use of his goods, which will often depend on having them at command at a particular time.

The privilege of compensation or of retention was not original in the law of any country; its subsequent introduction, and always under various limitations, having been owing to considerations of equity.

In Rome, so far from being a part of the common law, compensation was only at first admitted *ex equitate* by the Prætor, in *judiciis bonæ fidei*; nor was it extended so as to become admissible in *judiciis stricti juris*, prior to the rescript of the Emperor Marcus; Vinn. ad Instit. p. 811. And in England, it was but in the reign of Geo. II. that compensation of mutual debts unconnected with each other, was authorised by statute.

That in Scotland, before the statute of 1592, c. 143. compensation was not permitted by way of exception, appears from Balf. Pract. p. 249.; Stair, b. 1. tit. 18. § 6. This statute speaks of compensation alone, being silent as to retention of *ipsa corpora*; which owes its introduction to the authority of the Court. But the retention thus authorised is always founded on a mutual contract, and consists in withholding performance on one side, until that on the other be ready to ensue; Dict. *voce* Mutual Contract.

In the case of an artist employed to manufacture goods, the contract that takes place, consists in an obligation on the one hand to perform the work and restore the subject, and on the other to pay the hire; the civil possession remaining all the while with the employer; Voet. lib. 4. tit. 2. § 1. l. 18. *pr. de adquir. vel amitt. possess.*; Blackstone, vol. 2. p. 452.; although the artist may avail himself of his actual custody, till the counterpart of the contract be fulfilled. But farther than this, which is a right arising immediately from the contract, the artist has no privilege of retention. For the defender's idea of the right extending as a security for extraneous debts, has no foundation in law.

If there were any ground for so unlimited a claim, it would not be confined to moveables, but would comprehend equally immoveable property. A tenant of a farm, for example, would, in an action of removing, be entitled to defend himself by the same plea, on account of a debt due to him by the landlord. But the law does not recognise any such doctrine; for even an heritable right to the lands in the person of the tenant would not be sustained as a defence. The maxim of law on this head is, *Nemo potest mutare causam possessionis sue*; Voet. lib. 19. tit. 2. § 32.; Dict. *voc.* Mutual Contract, vol. 1. p. 559.; Vinn. Select. Quæst. lib. 1. cap. 51.

Again, if such a comprehensive right existed in our law, it would certainly be announced by the writers, and recognised by the decisions. But the reverse is the case, as appears from the various authorities; where indeed the doctrine of retention is not treated with

much accuracy; Stair, b. 1. tit. 18. § 7; Bankton, b. 1. tit. 17. § 15. tit. 24. § 13.; Erskine, b. 3. tit. 4. § 21. See also Dict. vol. 1. p. 594.

The cases of factors intitled to retention of their constituents funds, and of the hypothec of writers, mentioned by the defender, do not support his plea. For factors are clearly understood to advance their money in the faith of this security, by which circumstance a virtual contract is formed; and the writer's hypothec has been always confined to claims arising out of his employment, so that it stands in the same predicament. Creditors of Lidderdale *contra* Naesmith, 5th July 1749, Kilkerran, *voc.* Hypothec; Macvicar *contra* Campbell, 1735; Orme *contra* Barclay, 18th November 1778.

As to the case of cautioners, this affords not a proper instance of retention; for it is the plea of compensation that really belongs to a cautioner, when his creditor lies under the obligation of relief to him.

In the question, Murray *contra* Chalmer, if the mandate had not fallen by the mandant's death, it was admitted, that the mandatary would have had no right to retain; but on the mandant's death the money in the mandatary's hands became a debt due to the representatives of the former, against which the latter was intitled to plead compensation; Kames's Rem. Dec. 19th June 1744.

The case of Hewit and Brockhurst has been misconceived. It did not depend on the supposition of any general right of retention, but altogether on the nature of the special powers conferred on a person concerned.

With regard to the supposed effect of bankruptcy, it is reasonable, that the loss resulting from it should be equally distributed among all the creditors; nor does the circumstance of one of them holding a part of the debtor's property by accident, and without any right of pledge, create a just preference. He is only a custodier for the creditors at large. To say that he would be in a worse condition thus than the rest of the creditors, is a mistake; because in the name of a trustee he could arrest, and in his own he could execute a poinding.

Nor is there any solidity in the distinction between the case of gratuitous loans and the like, in which the defender admits that retention is excluded, and that of contracts of a commercial nature: for if retention is not founded in the contract, it must be equally against right, whether that be onerous or gratuitous. The distinction receives no countenance from the Roman law, to which he appeals, as is evident from the passages above referred to; *Vid. etiam Voet. lib. 16. tit. 2. § 20.; lib. 20. tit. 2. § 28.* As to the *lex unica Codicis*, it gave not the right of retention against another creditor, but merely against the debtor himself; *Perezius, lib. 8. tit. 27. § 3.*

It is last of all to be observed, that the doctrine now maintained by the pursuer is in the law of England perfectly established, as is evident from the case of Green *versus* Farmer, reported by Burrow, vol. 4. p. 2214.; and by Blackstone, vol. 1. p. 651.

The Lord Ordinary reported the cause on informations, when the Court ordered a hearing in presence.

Afterwards, on advising the cause,

The majority of the Court seemed to be of opinion, That although an artist's right of retaining, for security of his hire, the goods on which his labour has been bestowed, be understood as *pars contractus*; yet his possession or custody being only *ad hunc effectum*, it becomes unlawful when stretched beyond these limits; that the proper possession therefore still remains with the owner; of which, it was observed, the competency of pouncing goods in that situation for his debts is a farther evidence; and consequently that there is not any room in such a case for the claim of retention.

Some of the Judges observed, That as in this case there had been a continuation from year to year of the same work performed to the owner, so the whole money due might be considered as an individual price for manufacturing one quantity of goods, and therefore that of the former any part might be retained, for whatever was due on account of the latter. And it was said, that the same principle of justice on which as to money compensation was founded, comprehended equally retention in respect of goods, which last would not, from its latency, give any peculiar occasion to fraud; for if this were intended, it could be as easily accomplished by a private agreement; nor would the bankrupt-statutes be less effectual against retention than other modes of security, when unduly attempted.

One Judge, who concurred with the majority as to the possession remaining with the owner, maintained at the same time, that in consequence of the owner's bankruptcy effect ought to be given to the plea of retention; for that by this event, the nature of all the contracts subsisting between him and his creditors was changed, and the whole converted into one general *count and reckoning*, inasmuch that any special claim for delivery under a particular contract must have ceased. The same Judge too noticed, that it was because the right of retention was always viewed as an attribute of the various contracts out of which it rose, that it had not been more specifically treated of by writers on law.

The Lords "repelled the plea of retention."

To this judgment, a reclaiming petition having been preferred and followed with answers, the Court, by a very narrow majority, adhered.

Reporter, Lord Justice-Clerk.
Clerk, Sinclair.

A&A. Wight, Cullen.

Alt. Dean of Faculty, Cathcart.

S.

Nº CLXIV.

N^o CLXIV.

February 15. 1791.

AGNES FORSYTH,

A G A I N S T

GEORGE SIMPSON.

ALIMENT.—PRESCRIPTION.—*A claim for bygone aliment of a bastard child, made by the mother against the father, falls under the triennial prescription.*

AGNES FORSYTH bore to Simpson a bastard child, of whom she had the custody during his childhood. When he was about seventeen years of age, she brought an action against Simpson for payment of a sum of money, corresponding to an yearly allowance for aliment to the child, while he was maintained by her; she having alledged, that little or nothing had been paid on that account by Simpson. To this claim he objected the triennial prescription, and

Pleaded: By the statute of 1579, cap, 83. it is declared, “ That all actions of debt for house-mails, mens ordinaries, servants fees, merchants accounts, and other the like debts, that are *not founded on written obligations*, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or by oath of his party.” Claims for aliment being comprehended under this statute, it is plain that the present one has suffered this prescription. It is true, that it is made by the mother, and not by a stranger, which however is of no consequence, because in either case the nature of the debt is the same. Nor is the decision Paterfon *contra* Cochrane, of a contrary tendency; for there the father having owned the debt, there no room was left for prescription; Fac. Coll. 14th February 1758.

Answered: If the defender had granted to the pursuer a *written obligation* for payment of this alimentary debt, then, by the express terms of the statute, the prescription could not have applied to the case. Now, as the law itself had conferred on the pursuer the character of creditor, on account of aliment furnished by her during the legal period of her custody of the child, any writing to that effect would have been absolutely superfluous and nugatory. But still, as has been shewn, the prescription would have been excluded; and as this consequence could not be owing to the superfluous writing,
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it seems to follow almost demonstrably, that it arises from the nature of the case; or, in other words, that the triennial prescription is not applicable to a claim like the present, made by the mother of a bastard against the father.

The Lord Ordinary “sustained the defence founded on the triennial prescription.”

And, on advising a reclaiming petition and answers,

The Lords adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Dunfinnan*.

Aff. *Stewart*.

Alt. *G. Ferguson*.

Clerk, *Mitchelson*.

S.

N^o CLXV.

February 23. 1791.

ALEXANDER BIRTWHISTLE,

AGAINST

LORD DAER.

BURGH-ROYAL.—*Being a Peer's eldest son does not disqualify for a place in the council of a borough.*

LORD DAER, the eldest son of the Earl of Selkirk, having been a candidate for the office of provost of the borough of Kirkcudbright, it was

Objected: That being the eldest son of a Peer, he could not be elected either as a magistrate or as a counsellor of any borough.

Answered: There exists no law or regulation, to disqualify the eldest son of a Peer from being a counsellor in a royal burgh. Were it even supposed to have been determined by the Scottish parliament, that a Peer's eldest son could not sit as the representative of a county or a borough,

borough, and that this should have the effect of excluding from the British House of Commons, such a disqualification could not be extended by implication to the case in question.

The Lords repelled the objection.

Att. Solicitor-General, Rolland.

Alt. Dean of Faculty.

Clerk, Menzies.

S.

N^o CLXVI.

February 23. 1791.

FREEHOLDERS of ORKNEY,

AGAINST

JOHN TRAIL.

MEMBER OF PARLIAMENT.—*No deduction to be made from a valuation on account of superior duties payable to a donatary of the Crown's. A decree of valuation ex facie regular, though liable to exceptions, is to be sustained until set aside by reduction.*

AT a meeting, in July 1790, for electing a member of parliament for Orkney and Zetland, Mr Trail was inrolled upon a qualification, which in part consisted of the valuation of certain *superior duties*, payable to Sir Thomas Dundas, to whose predecessor, the Earl of Morton, the Crown had granted them. In a complaint preferred against this inrolment, it was objected, that this part of the valuation ought not to have been admitted by the freeholders; and in support of the objection it was

Pleaded: Before the general valuation, the duties payable out of lands that held feu of the Crown were not valued, or at least no supplies corresponding to them were paid to the Crown, so that the rents of Crown-vassals lands were valued *minus* the feu-duties. This appears from the act of convention of 1643, and the act of parliament of 1649, cap. 21.

Of lands feued by subject-superiors, the valuation was laid partly on the feu-duties and partly on the rent paid by the subvassal; and when a forfeiture of the subject-superior happened, or in the case of

of church-superiorities assumed by the Crown, by which means the subvassal came to hold immediately of the Crown, he was not, beyond the extent of his own valuation, either liable to public burdens or intitled to any privilege.

With regard to Orkney, a considerable part of the lands had been feued out by the Crown prior to the general valuation of that country in 1653; and in valuing these lands, the feu-duties were deducted as mentioned above. When these feu-duties, together with the property-lands, were conveyed to the Earl of Morton, they received a separate valuation; and he and his successors have ever since paid cess for them, while the landholders pay only according to their real rents. Those duties, therefore, ought not to have been included in the valuation in question.

It has been found, that a grantee of feu-duties, formerly payable to an Abbey, was not, by the valuation of them, intitled to vote. Nor was it contended, that the vassal by whom they were paid, had any better title; Campbell *contra* Campbell, 17th January 1755. Feu-duties in that situation confer no right of voting. Had they been payable to the Crown at the time of the valuation, as they would not have been valued at all, no person would have voted upon them, and the accident of their being valued, does not make any material difference.

Answered: The rescinded statute of 1649, above quoted, directed the commissioners to report the yearly value "of all feu or tack duties payable to any person, his Majesty's duties excepted." Thus, it is evident, that of lands held of the Crown, the full yearly value was to be reported; and the same thing may be said of those held of subject-superiors, the separate valuation of the feu-duties serving probably as a rule for proportioning the public taxes between the superior and the subvassal.

In the act of parliament 1681, accordingly, nothing is said of any deduction from the valued rent on account of feu-duties, though with respect to the *old extent* these are expressly distinguished. Nor could the circumstance of the Crown-rents being conveyed to the family of Merton, influence the rights and privileges of the Crown-vassals.

The notion of a subvassal's privileges being limited by his valuation *minus* the feu-duties, seems to be groundless. But if, as is said, their situation in respect of burdens and privileges continued the same after their becoming immediate vassals of the Crown, by parity of reason the landholders of Orkney should be as little affected by that grant.

The complainers plea indeed is inconsistent with the most indisputable circumstances; the feus of the Crown's property-lands being granted without diminution of the rental, the feu-duties must have been at least equal to the rent. But if, immediately before the valuation in 1653, a feu had been granted, when the feu-duty, real rent, and valued rent, would naturally be all the same, the vassal of the Crown, according to that argument, however great his valued rent might

might be, could not have voted; which seems equally contrary to constitutional principles, and to the terms of the statute 1681. In such a case, then, the vassal had a right to vote on the valuation of his lands; and in like manner, if the rent had come to exceed the amount of the feu-duties, this claim would have extended to the total valuation.

Nor does a superior's qualification depend on the mode of paying the cefs. This may be paid by a subvassal or by a tenant, as well as by the Crown's assignee. But it is the lands that are ultimately liable for the public burdens; and indeed by the strict letter of the statute 1681, the right of voting is attached to the Crown-vassal infeft in the lands so liable.

The case of Campbell that has been quoted may show indeed, that a grantee of feu-duties, not being himself the Crown-vassal, is not intitled to vote on them; but the present question respects the vassal who pays, and not the grantee who receives, the feu-duties.

The Court repelled the objection.

In the same complaint, the following objection was likewise stated. Certain lands, that at the time of the general valuation had been valued *in cumulo* with other lands not belonging to Mr Trail, also composed part of his qualification. In a process of division of this *cumulo* valuation, the commissioners of supply had pronounced a decree, ratifying the proportional valuation of these lands at L. 60. But it was

Objected: That the proceedings of the commissioners previous to their decree were so irregular and defective, that it ought to be considered as null and void.

Answered: The decree itself being, *ex facie*, formal and unexceptionable, must be held to be good until it be set aside by a process of reduction.

The Lords repelled the objection.

A&C. *Wight, et alii.*

Alt. *Rolland, et alii.*

S.

N° CLXVII.

N^o CLXVII.

February 23. 1791.

ROBERT WELLWOOD,

A G A I N S T

ROBERT WELLWOOD, and others.

TAILZIE.—CLAUSE.—*A destination being to the granter in liferent only, and failing him by decease, to another person in fee; the latter understood to be disponee or institute, and not an heir of entail.*

HENRY WELLWOOD executed a bond of tailzie of his lands, containing a procuratory of resignation, in favour “of himself in life-rent, for his liferent-use only, and *failing of him by decease*, to Robert Wellwood his nephew, and the heirs-male of his body; whom *failing*, to the heirs-female of Robert’s body,” &c. The usual prohibitory, irritant, and resolute clauses, respecting selling the estate or contracting debt, which the bond contained, were directed against “the heirs, whether general or of tailzie, before mentioned,” without naming Robert Wellwood, or distinguishing him as disponee or institute. But in several places of the deed, the expression runs thus: “the said Robert Wellwood my nephew, and the *other* heirs of tailzie before mentioned.”

On the death of Henry Wellwood, Robert made up his titles to the estate, by executing the procuratory of resignation. He afterwards having an intention of selling the lands, instituted a declaratory action against the heirs of tailzie, for having it found, “That being *nominatim* disponee, institute, and fiar, in the said estate, he was not an heir of entail, and therefore not liable to any of the conditions, provisions, limitations, or restrictions in the said deed of entail.” And in support of this action he

Pleaded: By the conception of this bond, the pursuer became fiar; the only right remaining in Henry Wellwood being a liferent by reservation. It is true, that a destination to a father in liferent, and to his children *nascituri* in fee, renders the father a constructive or fiduciary fiar. But this is *ex necessitate*, because a fee cannot be *in pendente*; whereas, in the present case, there was no such necessity, the fee being vested in the pursuer as *nominatim* disponee, to whom the other persons named were heirs of tailzie and provision.

But, in consequence of that strictness of interpretation which is ever applicable to entails, the pursuer, as institute or disponee, ought not to be included under those prohibitions and irritancies, which are directed against “heirs of entail.” This limited construction is established by the cases of Leslie, 24th July 1752; and of Balfour,

14th February 1758. But, in that of Edmondstone, 24th November 1769, the very point now maintained was so determined by the House of Lords; a judgement which has been steadily followed as a precedent, particularly in the case of Menzies, 25th June 1785.

With regard to the phrase, "*other heirs of tailzie*," that happens to occur in some parts of the deed, and seems to refer to Robert as in that class, it is to be observed, that the law, explained by the case of Edmondstone, requires the technical and appropriated expression in its proper place; and it is not enough that such words, as if casually occurring, may be found in other parts of the deed.

Answered: The entailor's purpose of restraining the institute, not less than the substitutes, is implied in the very idea of an entail, calculated, as this was, for preserving his estate among his kindred. It is true, however, that entails are to be strictly construed; and it is admitted, that the judgement in the last resort in the case of Edmondstone is an established precedent.

But that case was essentially different from the present. There the granter disposed his estate directly "to his eldest son, and his heirs-male; whom failing, to his second son," &c.; and of course the fee was immediately vested in the eldest son, who, by investiture as institute or disponee, could make up a complete feudal right to the lands. Here, though, *ex figura verborum*, the granter resigned in favour of himself in life, *for his life only*, yet, instead of vesting the fee in the pursuer, he is only called to the succession thus: "Failing of me by decease, to Robert Wellwood," &c. Hence he could not be considered as an institute or disponee, but as an heir of entail; and in order to make up a proper title to the estate, he ought to have been served heir of entail and of provision to the granter. And if before the entailor's death Robert had died, his son must have made up a title, not as heir to him under the entail, but as heir of entail to the granter.

The Lord Ordinary reported the cause on informations.

Some of the Judges thought that there was no immediate disposition of the fee, the conveyance being *to the granter in life only*; and though to Robert in fee, yet not till after the granter's decease; so that, as a fee cannot be *in pende*, the granter was fiduciary fiar, and Robert heir of entail.

But the opinion of the majority was, That the words "failing of me by decease," referred to the possession or enjoyment of the estate, and not to the fee; and therefore that Robert was to be considered as *nominatim* disponee or institute.

The Lords repelled the defence.

Reporter, Lord Justice-Clerk.

Adv. Macdonald.

Adv. Wight.

Clerk, Home.

S.

N^o CLXVIII.

February 23. 1791.

WILLIAM GORDON,

A G A I N S T

DAVID MACCULLOCH.

TAILZIE.—CLAUSE.—*A destination of fee to the granter himself, and to a nominatim disponee, does not carry it out of the person of the former.*

I DWARD MACCULLOCH of Ardwell executed a deed of entail, by which he disposed the estate thus: “*To myself, and to David Macculloch, my only lawful son, and the heirs-male of his body, &c. ; which failing, &c. ; reserving not only my own liferent of the said lands, but also full power and liberty to alter,*” &c. And the same expression of “*myself and David Macculloch,*” is repeated in the obligation to infest, and in the procuratory of resignation.

In the prohibitory clauses he is named thus: “*The said David Macculloch, and my said other heirs;*” or thus: “*Neither the said David Macculloch, nor any of the heirs of tailzie.*” But the irritant and resolute clauses mention only, “*my said heirs of tailzie,*” without introducing his name.

David Macculloch made up titles to the estate by service, as heir of tailzie and provision to his father; but afterwards, in contravention of the entail, he granted certain deeds tending to alienate or to burden the lands.

On this account, Mr Gordon, one of the substitute-heirs, instituted against him an action of declarator of irritancy. His defence being founded on the above-mentioned conception of the entail, he

Pleaded: The defender is a *nominatim* disponee, and not an heir of entail. It is true, the disposition is also “*to the granter himself;*” but if the fee had not been really conveyed to the former, the reservation of liferent in favour of the latter would have been superfluous.

Were it even considered as a conjunct fee, the defender would take the estate by infestment on the entail, without any necessity of service as heir; Bankton, vol. 1. p. 658. § 6. ; *ibid.* p. 576. § 116. January 1734, Ballantine.

But

But if he be not an heir of entail, he is not subject to any of those irritancies which by the deed in question are directed against heirs of entail alone; the law in regard to this point being now established.

Answered: The fee of land-property must remain in the person of those who are vested in it, or in their *hereditas jacens*, until it be taken away, either by a deed of the proprietor, or by service.

As in the present case the terms of the settlement were not such as to divest the granter, the disposition being "to himself," as well as to the defender, it is by service alone, as heir of entail, that the right of the former could be transmitted to the latter. Such was the determination of the Court, in the case of Lord Napier *contra* Livingstone, 3d March 1762, affirmed in the House of Lords 11th March 1765*.

Replied: In that case the destination was, "to us the Countess of Findlater, (the granter), and James Earl of Findlater, our husband, "and longest liver of us two, in liferent and conjunct fee, and for "the said Earl his liferent-use thereof allenerly, and to James Livingstone, and his heirs," &c. Thus James Livingstone was not conjoined with the Countess and her husband in the fee; the clause relative to the conjunct fee being closed before his name was mentioned. But the present instance is the reverse of this; so that the two cases are not parallel.

The cause was reported on informations; when, without paying attention to the circumstance of the defender's being actually served heir, which, if erroneous, would have gone for nothing, except so far as it indicated the sense of parties,

The Court regarded the judgement in the case of Lord Napier as decisive of the present question, its application to which had been first suggested from the Bench; and therefore

"The Lords found and declared in terms of the summons of declarator;" and on advising a reclaiming petition, and answers, adhered to this interlocutor.

Reporter, Lord Stonefield.
Clerk, Menzies.

Adv. G. Fergusson.

Adv. Dean of Faculty, Cathcart.

S.

* Not yet collected.

N^o CLXIX.

March 1. 1791.

The TRUSTEE for the CREDITORS of JAMES STEIN,

A G A I N S T

Sir WILLIAM FORBES, JAMES HUNTER, and COMPANY.

BANKRUPT, Act 1696, c. 5.—*Indorsations of bills of exchange by a merchant to his banker, in the ordinary course of business, how far affected by it.*

JAMES STEIN, who carried on a very extensive trade as a distiller at Kilbagie, in the county of Fife, had many dealings with Sir William Forbes, James Hunter, and Company, bankers in Edinburgh.

Sometimes the bills discounted by Stein, being considered as cash, were immediately carried to his credit in his account current; but more frequently no credit was given for the contents of the bills indorsed to or deposited with the company, till they were paid by those who were immediately liable for them.

Stein, on 28th February 1788, was rendered bankrupt in virtue of the statute of 1696, c. 5. On 29th December 1787, being the sixty-first day before the bankruptcy, the sums due by him to Sir William Forbes and Company, as appearing from the debit-side of his account-current, amounted to L. 9868:16:5; but the company held in their hands bills and other securities deposited by Stein to a much greater amount.

During the sixty days, however, which immediately preceded the public bankruptcy, Sir William Forbes and Company having no suspicion of Stein's failure, advanced large sums for him. At the date of the bankruptcy, the balance against Stein, on the face of his account-current, was L. 34,636:11:10. Besides, in consequence of bills due by him, which had been discounted by other people at the same banking-house, he was a debtor to the company in a farther sum of L. 15,000. But during the same period, he had indorsed, and deposited with the company, bills, and other negotiable securities, to the amount of L. 18,458:2:4; so that the advances by the company during the sixty days before the bankruptcy, exceeded the deposits by L. 6309:13:1.

In the ranking of the creditors, a claim having been entered by Sir William Forbes and Company for the whole sums due by Stein,

4 S

amounting

amounting to L. 49,494, 4d. it was objected by the trustee for his creditors, That the indorsations and deposits of bills for L. 18,458, 2s. 4d. being within sixty days of the public bankruptcy, fell under the enactment of 1696, c. 5.

Informations having been ordered on this point, the trustee

Pleaded: However important to a commercial country the free circulation of bills of exchange may be, it has not been thought proper to introduce, with regard to them, any exception from the general rule laid down in the enactment of 1696, c. 5. by which it is provided, "That all and whatsoever voluntary conveyances and assignments, or other deeds which shall be made, directly or indirectly, by a bankrupt, either at or after his becoming a bankrupt, or in the space of sixty days before, in favour of his creditors, either for his satisfaction or security, in preference to other creditors, should be null and void."

The indorsations here cannot be considered as *payments* in cash, no credit having been given for them till the proceeds were recovered by the indorsee. They cannot be considered as *securities* for money *instantly advanced*, the several indorsements having no relation to the sums disbursed for the indorser's behoof. Neither can it be said that they were *pledged* for future advances, in which case it might have been argued, that the bankrupt having been at no time indebted to the indorsee, the statute was not applicable. It appears that at all times the company were in advance for the bankrupt.

And it is of no importance, that during the sixty days prior to the bankruptcy, the advances by the company exceeded the deposits. As neither the bankrupt nor the company were under any obligation to continue their dealings, every different transaction must be considered apart from the rest. And thus the money arising from the indorsed bills having been necessarily employed to discharge debts antecedently due, the operation of the statute seems inevitable.

Answered: The indorsation of a bill of exchange, by a bankrupt, in security or satisfaction of a prior debt, unquestionably falls under the enactment of 1696. Still however it will not follow, that transactions such as the present, and which are essentially necessary for the carrying on of an extensive trade, can be affected by it.

The nature of the intercourse between the parties evidently was, that Stein should procure good bills, and that for these bills Sir William Forbes and Company should furnish cash, to be paid to him as the exigencies of his trade required. The indorsements, therefore, were not made in security of a prior debt; they must be considered as granted for value, the company, by receiving the indorsations, becoming bound to hold in readiness the proceeds for his accommodation.

If, indeed, the indorsations during the sixty days prior to the bankruptcy had exceeded the advances, it might have been maintained, that being indirectly the means of preferring the indorsee to the
other

other creditors, they ought to be disallowed. But as the very reverse of this happened, it cannot with any reason be pretended, that while the indorfees are precluded from recalling the payments made by them, they should be prevented from availing themselves of those deposits, without which the advances would not have been made.

The Court were unanimously of opinion, that the case here occurring did not fall under the enactment.

After advising informations,

The Lords “ found, that the act 1696 does not apply to the present “ question, and repelled the objections to the claim of Sir William “ Forbes and Company.”

Reporter, Lord Justice-Clerk.

Act. Lord Advocate.

Alt. Honyman.

Clerk, Home.

C.

N^o CLXX.

March 1. 1791.

The CREDITORS of NEIL MACKELLAR,

A G A I N S T

DONALD MACMATH.

BANKRUPT, Act. 1696, c. 5.—*After a legal bankruptcy, incapacity continues, till solvency proved. What acts constitute imprisonment. Bond of corroboration struck at.*

SO early as the year 1771 Mackellar was in embarrassed circumstances, and a great variety of diligence, by horning, inhibition, and caption, was issued against him in the subsequent years.

In the year 1776 he was in the custody of a messenger for some hours, after which he paid the sums due to the creditor at whose instance

stance the caption had been obtained, amounting to L. 150; but he never was put in prison, nor was any written execution of his having been apprehended made out by the messenger.

Mackellar was indebted to the father of Donald Macmath to a considerable amount, partly by bills, partly by open accounts, and partly by bonds. All these grounds of debt having, in 1780, devolved to Donald Macmath, in virtue of a general conveyance executed by his father, Mackellar granted to him a bond of corroboration, wherein the whole sums due, including the arrears of interest, were thrown together, and a corresponding penalty stipulated.

In virtue of this bond of corroboration, and without obtaining confirmation as a general disponee, Donald Macmath proceeded, along with the other creditors, to lead an adjudication against the lands belonging to Mackellar.

The lands being sold judicially, a competition of the creditors ensued; and an objection, founded on the statute 1696, c. 5. was stated to the claim entered for Donald Macmath. In support of this objection it was

Pleaded: Before the date of the bond of corroboration the grantor had become legally bankrupt in virtue of the statute 1696. His debts far exceeded his effects. Several years before, in virtue of horning and caption, he had been seized and detained in the custody of a messenger, until he could raise the sums necessary for obtaining his enlargement. Thus the granting of the bond itself, with every thing following upon it, became ineffectual and void.

It is of no importance that in this case the debtor was never put in prison. Where it appears that the apprehending was used only for the purpose of obtaining a partial payment, without any intention to imprison, it has been doubted how far the statutory requisites can be considered as having been fulfilled, 17th November 1785, Maxwell and others *contra* Gibb; but where the debtor was not set at liberty until the whole debt was paid, his detention, whether in a private house or elsewhere, has been justly held sufficient; 5th July 1774, Frazer.

It is of as little importance that the apprehending of the debtor has not been vouched, in this case, by the official report of a messenger. Where the sums due are immediately recovered, no such report being necessary for the user of the diligence, it is generally omitted. What the law regards is the debtor's submitting to the disgrace attending the final execution of the caption; and this may be proved as any other fact, by such evidence as affords conviction to the judge.

It is equally unimportant, that after being thus made legally bankrupt, the debtor continued in the administration of his affairs, and that he was still intrusted with the management at the time when the bond of corroboration was granted. The words of the law are general, avoiding all transactions *at* or *after* bankruptcy; and it would be attended with the most mischievous consequences if a different rule were to prevail. The longer a person continues in a state of insolvency, the danger of fraudulent preferences is the greater.

It

It is only when he has fully paid the debts due by him, that he becomes a *new man*, and intitled to the full exercise of all his rights as a proprietor.

The only question therefore is, whether the granting of a bond of corroboration is to be considered as prohibited by the statute. But this can be attended with little doubt. It is not enough for excluding the operation of the law, that no wrong was meant. With regard to actual frauds there was no occasion for the interposition of the legislature. It was to prevent undue preferences where the deeds were *ex facie* liable to no objection, but where the situation of the debtor exposed him to many temptations, that the general rule was laid down in 1696, and the hands of the debtor, after public bankruptcy, and for sixty days preceding, tied up from deeds of every kind, whereby the situation of one creditor may be rendered more advantageous than that of his competitors.

The words of the statute, which being for the prevention of fraud, ought to be liberally construed, are, that "all and whatsoever voluntary dispositions, assignments, or other deeds which shall be found to be made or granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days, if before, in favour of his creditors, either for his satisfaction, or farther security in preference to other creditors, shall be void and null." A bond of corroboration evidently falls under this enactment. It is a deed voluntarily granted; it is granted to one creditor in preference to others, who being in the same situation, have been allowed to follow the ordinary course of law in obtaining a confirmation; and it is done in favour of one of the creditors, the sums due to him being thereby enlarged by the accumulation of the interests, and a heavy penalty.

But, beside the advantages thus immediately resulting to the favourite creditor from a transaction of this kind, there are others more indirect, which it was the purpose of the legislature to restrain. In making up titles by confirmation, there is a danger of omitting some of the requisite forms, which would be fatal to the diligence founded on it. The confirmation itself is a species of diligence, by which other creditors might have been prompted to take those measures which were necessary for their obtaining a rateable distribution; an opportunity is also given to attach the estate of the debtor with more dispatch. But this is not all: In this way debts may be saved from prescription—objections in point of form may be removed—and thus not only the equality of distribution among the creditors may be affected, but the funds which are to be the subject of it, may be wholly taken away.

Though, at an early period, our Courts seem to have erroneously considered this enactment to be of a correctory nature, no determination can be mentioned as a precedent for the present case. In that of *Watson contra Cramond*, 31st July 1724, where, within the sixty days, the debtor had granted a procuratory or warrant for serving

himself heir to his ancestor, the deed had no relation to any particular debt. The case of the creditors of Gratney, February 1728, was decided on the same principle. In that of Cowan against Mansfield, 7th January 1762, where, within the sixty days, a debtor, in lieu of certain bills, had granted a new one including interest and exchange, unless the mercantile nature of the transaction shall be thought to have authorised a distinction, the determination must be considered as contrary to the true meaning of the law. That case, however, appears to be so far different from the present one, that the debt was not, by the new bill, enlarged beyond what it would have been if the creditor had instituted an action, and arrested upon the dependence of it.

In the later decisions, the views of our Courts have been more just and enlarged. In the ranking of the creditors of Alcorn, it was found, that a bond of corroboration was struck at by an inhibition, though the debt due to the inhibiting creditor was posterior to that corroborated, 19th June 1782; and in a still more recent case, where a bill of exchange had been granted to a creditor for the purpose of warranting a sequestration, the voucher was set aside, although the intention of it was not, as in the present case, to create a preference, but to remove it; 19th January 1788, Scot *contra* Bruce. In those cases, as well as in that of Bedlay's creditors, 19th November 1783, a general rule was laid down, which ought never to be departed from, that after public bankruptcy, the law alone ought to regulate the distribution of the debtor's effects.

Answered: The enactment of 1696, intended for the advancement of commerce, must not be so construed, that it shall have a tendency to destroy all confidence between man and man. This, however, would be the case, if, after the execution of diligence by horning and caption, the deeds of a person continuing for years in the full administration of his affairs were to be set aside. One so situated, cannot be considered as a bankrupt to whom the statutory regulations are applicable; and unless fraud be proved, his actings must be valid.

The consequences of a contrary doctrine would be still more dangerous, if the mere apprehending of the debtor, and that verified only by parole testimony, were to be considered as equal to imprisonment. By rendering this necessary to every act of bankruptcy, the legislature had in view to give public notice of the debtor's situation; nor could it be intended, that the efficacy of deeds of the greatest importance should depend on the mere assertion of an inferior officer of the law, without those means of detecting his falsehood, which the production of a written execution must afford. Indeed it may be doubted, whether, in such a case as this, where the debt was immediately paid, even actual imprisonment, authenticated in the most regular manner, could be regarded.

But although it should be held that the debtor, in this case, had been rendered bankrupt in the manner required by the statute, that would not be sufficient for undoing what has been here done. A debtor may act unjustly to his creditors by embezzlements, under the

the colour of onerous bargains ; or by voluntary alienations to one class of creditors, in defraud of diligence already commenced by others not so much favoured. Proceedings of this kind by a person whose debts exceed his funds, though he is not notoriously insolvent, have been restrained by the statute of 1621. After public bankruptcy, it has been thought necessary to impose some farther restrictions, so as to prevent " all voluntary *dispositions*, *assignments*, and other " *deeds*, either for *satisfaction*, or *farther security* of the favoured creditor," &c. but, as the purpose of the law does not seem to be frustrated by the granting of a bond of corroboration, so the words of the statute do not seem to reach such a case.

The granting of a bond of corroboration is neither a *disposition* nor an *assignment* ; and although it is a *deed*, it is of a different nature from those which are particularly mentioned in the statute. It is not given in *satisfaction* to the creditor, nor for his *farther security*, as he must still pursue the same measures for attaching the debtor's estate as formerly. It is nothing more than an act of accommodation to save the expence of confirming. From proceedings like these, the legislature could not intend to withdraw its sanction. Indeed, when the retrospective effect of the statute is taken into view, all transactions of the nature of those prohibited being set aside, if completed within sixty days of the public bankruptcy, it would be palpably unjust, if, in consequence of an act of this kind, a creditor should be deprived of the sums justly due to him.

These are merely imaginary evils which have been stated as resulting from giving effect to deeds of this nature. If, after granting a bond of corroboration to one creditor, the same accommodation should be refused to another, the proceeding would be set aside on the head of actual fraud. If an attempt were made in that manner to revive debts long before done away by prescription, it would doubtless be disappointed. Even so far as the bond here granted may be thought to enlarge the debt by an accumulation of the interests, or by the addition of a penalty, this may be rectified without avoiding the document, so far as it only acknowledges a just debt.

If, after the leading of several adjudications, it were necessary, for enabling another creditor to come in *pari passu*, that a bond of corroboration should be granted to him, this surely could not be thought fraudulent. Though the words of the enactment had been so broad as to comprehend such a proceeding, a court of law would not, in opposition to its true meaning, give effect to them. The case of a bond of corroboration granted after inhibition differs widely from the present one. Even the granting of an heritable security for money actually advanced is struck at by an inhibition, though such a transaction is not prohibited by the statute of 1696.

The Court were unanimously of opinion, that in this case the circumstances necessary for inferring public bankruptcy were sufficiently established, imprisonment not being absolutely necessary, while the act of apprehending the debtor might be ascertained by the method here practised.

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The Court were also unanimously of opinion, That the payment of the debt, in virtue of which ultimate diligence had been used, was not sufficient to take off the effects of public bankruptcy, and that this could only be done by showing that the debtor had afterwards been in a situation to pay all his debts due at the time.

As to the legality of the bond of corroboration, a great difference of opinion prevailed. So far as the debt was thereby enlarged, and a penalty superadded, it was agreed, that no effect ought to be given to it in a question with the creditors. Still, however, as the bond was good against the debtor himself, these circumstances were thought by many of the Judges to afford no ground for setting aside the adjudication *in toto*, it being considered as unreasonable, where nothing fraudulent or collusive could be stated, to annul a deed which, without any apparent injury to the other creditors, tended to save unnecessary expence to the party obtaining it.

On the other hand, it was observed, that by requiring a proof of actual fraud, in order to set aside deeds of this kind, the purpose of the enactment in 1696 would be in a great measure frustrated, and that while by the establishment of such a general rule as was contended for by the objecting creditors, many improper proceedings would be prevented, no injustice could arise from it, every person being equally put on his guard.

After advising informations, the Court "sustained the objection."

A reclaiming petition was preferred, which was followed with answers.

Counsel were afterwards heard.

And the Court, by a very narrow majority, adhered to the judgment formerly pronounced.

Reporter, Lord *Ankerville*.
Clerk, *Home*.

A&A. *Abercromby*, *Honyman*.

Att. Solicitor-General, *Ross*.

C.

N^o CLXXI.

N^o CLXXI.

March 2. 1791.

CREDITORS of JOHN BROUGH,

AGAINST

The HEIRS of ROBERT SELBY.

RIGHT IN SECURITY. — CAUTIONER. — BANKRUPT. — *An heritable security in relief granted to a cautioner in a cash-credit, good only as to money advanced prior to the infestment.*

SELBY was a joint obligant along with Brough in a bond granted to a banker for a credit in a cash-account, to the extent of L. 500. Being, however, only a cautioner, Selby at the same time obtained from Brough a bond of relief in common form, and a *disposition in security*, of a tenement of land in Edinburgh, upon which disposition infestment immediately followed.

Brough became afterwards bankrupt, having previously operated on the cash-credit to the full amount, though at the date of the infestment nothing had been drawn upon it.

Selby having paid the debt to the banker, his heirs after his death, in the competition of Brough's creditors, claimed a preference in virtue of the disposition in security. To this the other creditors objected, that at the date of the infestment no part of the debt having been contracted, the security was void as having reference to a future debt; and in support of this objection they

Pleaded: It is established by the decisions in the cases of Pickering *contra* Smith and others *, and of Steen's creditors *contra* Newnham and others †, that heritable securities for money to be advanced after their date, in consequence of such a cash-credit as that in question, fall under the statute of 1696.

It is true, that here the disponent was not the principal creditor, but a cautioner or creditor for relief. The difference however is immaterial. The only essential circumstance is the debt being contracted prior or posterior to the security, on which surely it can make no variation whether the claim under the security be made in the one character or in the other. If the contracting of the debt be subsequent to the infestment, the last will be equally unavailing to a creditor for relief as

* Supra, p. 25.

† Supra, p. 159.

to a principal creditor.—Nor is there any ambiguity as to the nature of the debt, for relief of which the cautioner becomes a creditor. For as upon the money being advanced, and not sooner, the principal debt arises to the principal creditor, so at the same instant, the accessory debt arises to the cautioner as creditor for relief. Before the actual advance of the money, he is not more to be considered as such than the advancer of it was to be regarded as principal creditor; for it does not stamp either of them with the character, that they have come under obligations to do what is future, the one in advancing the money, the other in becoming surety for such advance.

Answered: Such securities for relief of cautioners in cash-credits are in practice extremely common*; nor do they seem less agreeable to law than those granted to cautioners for persons obtaining offices of trust, with respect to the validity of which however no doubt can be entertained. There is not an argument which can be urged for supporting an heritable security in either of the cases, that does not apply with equal force to the other.

It has been said, that before the money was actually advanced there was no existing debt, nor any room for a security in relief. But it is plain that the cautioner had previously come under an effectual obligation to be responsible for the debtor's operations on the cash-credit, while over these he possessed no means of controul; against which obligation, therefore, he was entitled to present relief, so that it cannot be regarded as a future debt.

The cases of Pickering and of Newnham, as they related to securities obtained by the creditor, afford not any precedent for the present, which respects a cautioner.

The Lord Ordinary pronounced this interlocutor: "In respect that
"in the bond of relief John Brough, the principal debtor, is bound to
"relieve, free, and harmless keep, Robert Selby, the cautioner, from
"the payment of the contents of the bond of credit, and for that
"effect to deliver it up to him cancelled, or report a valid discharge
"thereof, duly registered, against the term of Whitsunday then next;
"repels the objection."

On advising however a reclaiming petition, with the answers,

The Lords altered this interlocutor, and found, "That the heirs of
"the deceased Robert Selby are only preferable in virtue of his in-
"feftment for the sums they can instruct to have been advanced at
"the date of the said infestment."

Lord Ordinary, *Dreghorn.*
Clerk, *Mitchelson.*

For the Creditors, *Cullen.*

Alt. *Abercromby.*

S.

* A variety of late instances were produced from the register of feilins.

N^o CLXXII.

March 3. 1791.

Sir ALEXANDER CAMPBELL, Baronet.

AGAINST

DAVID BALLINGALL.

MEMBER OF PARLIAMENT.—Act 16th Geo. II. c. 11.—*A complaint received for not expunging the name of a freeholder, though no precise decision given in the freeholders court.*

AT the meeting for electing a member of parliament in the county of Stirling, on 6th July 1790, David Ballingall, who many years before had been inrolled as a freeholder, was present.

At this time John Johnston, one of the freeholders, proposed that several questions should be put to Mr Ballingall, tending to show that the titles on which his inrolment was founded were nominal, and had never been followed with possession.

Mr Ballingall refused to answer these questions; but declared his readiness to take the trust-oath. Mr Johnston then proposed, (as the minutes of election bear) "That as Mr Ballingall refused to answer, he should be held as confessed, and ordered to be struck off the roll of freeholders; and protested, That his oath at any future period should be void, and that he ought to be expunged from the roll of freeholders."

The freeholders did not proceed to a vote on the merits of these objections; and the minutes of election respecting Mr Ballingall only farther mention, that "the oath of trust and possession having been tendered to the said David Ballingall, the same was taken by him."

A petition and complaint was afterwards preferred to the Court of Session, by Sir Alexander Campbell, one of the freeholders, praying that Mr Ballingall's name should be expunged from the roll.

In bar of this complaint, it was stated, That such an application was only competent in three cases: 1. On a refusal to admit a claimant; 2. On an improper admission; and 3. On a refusal to expunge; but that the case then before the Court was dissimilar from all these, the freeholders having given no decision on the question, Whether Mr Ballingall should be struck off the roll or not?

The

The Court were clearly of opinion, That the circumstance of the freeholders having entirely disregarded the motion made by one of their number respecting Mr Ballingall was equivalent to a refusal to expunge; and therefore

The Lords sustained the petition and complaint as competent.

A&C. Geo. Fergusson, et alii.

Alt. Dean of Faculty, et alii.

C.

Nota, Another question occurred at the same time, Whether a complaint, not entered within four months of the freeholder's inrolment, nor founded upon an alteration of circumstances, could be listened to? In this case the Court allowed a proof, which was taken. But the merits of the election having been previously determined by a committee of the House of Commons, the Court had no opportunity to give any decision on the import of it.

N° CLXXIII.

March 3. 1791.

GEORGE DEMPSTER, and others,

AGAINST

CHARLES LYEL.

MEMBER OF PARLIAMENT.—Act 16th Geo. II. c. 11.—*An application for being continued on the roll, in virtue of a restricted qualification, equivalent to a claim for being inrolled, so as to authorise a summary complaint.*

MR LYEL was inrolled in 1784 as a freeholder in the county of Forfar. Having conveyed to his son a considerable part of the lands in virtue of which he had been admitted to the roll, Mr Lyel, at the meeting for election on 2d July 1790, preferred a petition to the freeholders, in which he prayed that they would allow him to retain his former place in the roll, the lands still belonging to him being, as he alledged, sufficient for affording a freehold-qualification. No objection being

being stated, the freeholders granted the prayer of the petition.

Of these proceedings Mr Dempster, and several other freeholders in the county, complained in the manner prescribed by the statute of the 16th Geo. II. insisting that Mr Lyel had not produced sufficient evidence of the valuation of the lands retained by him, and that therefore his name should be expunged from the roll.

Mr Lyel objected to the competency of the complaint, and

Pleaded: The jurisdiction of the Court of Session, in reviewing the proceedings held at a meeting of freeholders, is purely statutory, and limited to three cases, 1st, where the claim of a person entitled to be inrolled is rejected, 2^d, where a person who stood upon the roll is unjustly struck off, and 3^d, where a person is inrolled whose titles are exceptionable.

Farther, although in this case the proceedings of the freeholders were liable to review, still the application here made must be considered as inadmissible. If the freeholders had been dissatisfied with the evidence laid before them, in order to shew that the retained lands were sufficient to give a right of voting, they might have rejected the claim of restriction; but as no objection was stated to the claimant's continuing on the roll, he could not be deprived of his place in it. And in the same manner, although the Court of Session, in reviewing the proceedings of the freeholders, may find that the valuation of the retained lands has not been properly ascertained, this will not authorise a striking off the roll; 9th August 1774, *Stewarts contra Daniel Campbell*.

Answered: The statutes authorising the Court of Session to controul the proceedings of freeholders being of a remedial nature, ought to be so construed as to fulfil the purpose of the legislature. In the present case, such a construction is evidently necessary. Without it, if a freeholder, after an alteration of circumstances, could prevail on a meeting to permit his continuing on the roll, although he had no right so to do, the wrong would be irreparable; *Wight on Elections*, page 136; 15th January 1766, *Ross of Aitnoth and others contra Sir John Gordon and Leonard Urquhart*.

If in such cases as the present, the Court of Session may interpose, no reasonable objection can be here stated to the form of the application. The judgement of the freeholders may be considered, either as an enrolment of the party on his new and restricted qualification, or as a refusal to sustain what was a sufficient objection to the former enrolment. And in either of these views the Court are authorised to give redress, by directing the name of the party to be expunged. The case referred to on the other side was very different from the present one, the proceedings having been held at a Michaelmas meeting, where no objection could be listened to which had not been lodged two months before.

By a considerable majority of the Judges, the application for a restriction was viewed as an objection made by the freeholder himself

to his continuing on the roll, in virtue of the lands formerly belonging to him.

And therefore the Lords found, that the petition and complaint was competent.

A&C. Mat. Ross, Hope.

Alt. Hay.

Clerk, Sinclair.

C.

N° CLXXIV.

March 5. 1791.

WALTER MACDOWALL,

AGAINST

CATHARINE MOLIERE.

PRISONER :—*Cessio bonorum*.—One imprisoned for a claim of damages, though *ex delicto*, entitled to the benefit of *Cessio*, if the bankruptcy arose from other causes.

IN an action of damages for seduction, instituted by Catharine Molier against Macdowall, the Court found her entitled, on that account, to a certain sum of money, for which she used ultimate diligence against him. Having been incarcerated at her instance, he raised a process of *Cessio bonorum*, in which she appeared, and maintained, that he ought not to receive this benefit to her prejudice, to whom he owed a debt *ex delicto*, for reparation of the injury she had sustained from him.

The Court took notice, that in cases of this kind there had occurred some contrariety in the decisions. In the case of Malloch, 19th Nov. 1751, the benefit of *Cessio bonorum* was denied to a person whose imprisonment was on account of a debt in name of assythment; and in that of Stewart, 9th August 1781, it was in like manner denied, the pursuer having been incarcerated for damages arising *ex delicto*: Besides that, in the analogous question concerning *the act of grace*, a person

son in prison for damages, Dirl. vol. 2. p. 174. Macleslie, 23d Dec. 1738, and another for statutory penalties, were found not entitled to that benefit. On the other hand, a person imprisoned until payment of money decreed against him for penalty and damages, was found entitled to the benefit of *Cessio bonorum*, 18th February 1764, Small *contra* Clerk. But it was observed, that a principle which had been adopted with respect to people who had been engaged in illicit trade tended to regulate all cases of this nature. If bankruptcy had been the result of smuggling adventures, the bankrupt was refused the benefit in question; whereas if his situation had been produced by other causes, that circumstance was not deemed sufficient to prevent him from obtaining it. On the same principle, it was added, as in this case the pursuer's insolvency was not owing to the present demand, resulting *ex delicto*, but to a variety of other debts, his action ought to be sustained.

The Lords repelled the defence, and found the pursuer entitled to the benefit of the *Cessio bonorum*.

A petition reclaiming against this judgement was refused without answers.

Act. Honyman.

Alt. Dean of Faculty.

Clerk, Colquhoun.

S.

Nº CLXXV.

March 8. 1791.

EARL of PETERBOROUGH,

AGAINST

WILLIAM MILNE.

TACK.—*Subsetting not permitted, when that power is not specially granted.*

L Ord Peterborough granted to Robert Shand a *missive of tack*, as follows: " I hereby agree to give you a lease of the farm of
" Essie and Pilmuir, &c. for the space of nineteen years; for which
" you

“ you are to pay me L. 60 of yearly rent, *in terms of the articles and regulations established by me on the estate of Durris, and to which reference is hereby had.* And you are to enter into regular and formal tacks with me, on stamped paper, when required, under the penalty contained in the said regulations.”

Those regulations, which related chiefly to the terms of payment of the rent, to certain reservations in favour of the landlord, to burdens imposed, or privileges conferred, on the tenants, and to the modes of culture, comprehended no express permission or prohibition of subsetting; although, in one part of them, mention was made of “ tenants and *subtenants* ;” and in another, of tenants, as distinguished from *possessors*.

In one instance of a lease on this estate, which was formally executed, it appeared, that a special power of subsetting was given; but all the other farms, of which there were several, were held under such missives as that stated above. It was, however, admitted to be customary for the tenants to let small portions of their lands to subtenants.

Shand having sublet his farm to Milne, an action of removing was brought by Lord Peterborough, against the latter, as holding possession without any proper authority; the missive of tack not containing a power to sublet.

Pleaded for the defender: Though it were admitted, that in the case of a formal lease the power of subsetting, if not expressed, would not be implied, this would not determine the present question. Here an obligation is created to enter into a future regular contract of lease, *in terms of the regulations referred to*, wherein, from the use of the term *subtenants*, the right of subsetting seems to be implicated.

Answered: By no such reference could a right to sublet be conferred, nor by any usage, however uniform. It was necessary, either that this power should have been contained in the missive of tack, or at least that it should have been expressly and specially mentioned in the deed referred to. This is plainly the consequence of the principle established in the case of Alison, 22d January 1788 *.

The Lord Ordinary, “ in regard it did not appear that the principal tenant had powers to sublet his farm, decerned in the removing.”

On advising a reclaiming petition and answers, the Court altered the Lord Ordinary’s interlocutor, “ and assoilzied the defender from the removing.”

Afterwards, however, a petition against this interlocutor having been presented, and followed with answers,

* Page 29. *supra*.

March 1791.

COURT OF SESSION.

359

The Court returned to the judgement of the Lord Ordinary, "and
"decerned in the removing."

Lord Ordinary, *Stonefield*.
Clerk, *Colquhoun*.

A&A. *Dean of Faculty*.

Alt. *G. Fergusson*.

S.

N^o CLXXVI.

March 8. 1791.

The DUKE of GORDON,

A G A I N S T

JOHN LESLIE, and others.

HERITABLE AND MOVEABLE.—PASSIVE TITLE.—SOLIDUM ET
PRO RATA.—*The executors of a tenant not liable for the rents of those
years of which the heir was intitled to reap the crop.*

WILLIAM LESLIE was the tackfman of a farm belonging to the
Duke of Gordon. He was also creditor to his Grace by a bill
for L. 220.

At William Leslie's death, his moveable effects descended to John
Leslie, and his other younger children, as his nearest in kin; while
the lease, which was a beneficial one, and did not expire for many
years after, devolved to his eldest son as his heir.

An action of multiple-poining, brought by the Duke of Gordon
soon after William Leslie's death, for the purpose of enabling him to
pay with safety the contents of the bill already mentioned, was not
brought to a conclusion till 1790. At this time, not only the rent
for crop 1788, but that for the following year, was unpaid; and for
these, as well as for the rents of the subsequent years, the eldest son
of the original tackfman having become bankrupt, his Grace claimed
retention out of the sums due by him. In support of this claim,
he

Pleaded: Those engagements which in this case the original tackf-
man came under to his landlord were a burden while he lived on his

whole funds, whether heritable or moveable. Had these funds never been appropriated by his family after his death, his landlord would have been authorised to attach any part of them for his payment: And so too, although the funds have been regularly transmitted in succession to the legal heirs, every one of those heirs, in representing him, must be liable; Stair, book 3. tit. 5. § 13.; b. 4. tit. 23. § 22.; Darie, 17th February 1633, Kinnaird *contra* Yeaman; 19th July 1637, Lord Innerwick *contra* Lady Smeiton.

Answered: The general principles which have been stated are unquestionably just; but they fail in their application to the present case.

A lease is in its nature an agreement founded on a *delectus personæ*, and therefore should be at an end when the lessee dies. From equitable considerations, however, the benefit of this contract is now held to transmit to the heir of the lessee. But as no part of this benefit can be claimed by the executors, no reason can be given why they should be exposed to any risk.

In the case of mercantile partnerships, where the share of a deceased partner is, by special agreement, given to one of his sons *nominatim*, his other children, if the concern was a lucrative one at the time of his death, have never been considered as liable for any part of the subsequent loss. So too, in the case of a feu-right, although the executors of the vassal may be required to pay the feu-duties incurred before the succession opened, no instance can be shown, in which, upon the subsequent bankruptcy of the heir, the superior has attempted to render them liable.

The present claim is not founded in the meaning of the parties, the lessee and his heirs alone being debtors in the obligation. If listened to, it would be attended with very unjust consequences, the executors having no way of securing themselves against the loss arising from the heir's bankruptcy. Neither is it necessary for the landlord, if he is sufficiently attentive, by exercising in due time his right of hypothec.

The Lord Ordinary found "the Duke of Gordon intitled to retention out of the sum in his hands, as craved."

A reclaiming petition was given in, which was followed with answers.

The Court, considering the crop of 1788 as belonging to the executors, were of opinion, That they were liable for the rent of that year.

But as to the rents of the subsequent years, a great majority were of opinion, That the heir alone, after being acknowledged by the landlord as tenant, could be sued for these rents.

The

May 1791.

COURT OF SESSION.

361

The Lords "found the Duke of Gordon intitled only to retention
" of his rent for crop 1788."

Ordinary, Lord Dreghorn.

Ald. Taft.

Alt. Dickson.

Clerk, Gordon.

C.

N^o CLXXVII.

May 13. 1791.

The CREDITORS of BRYCE, WILLIAM, and GEORGE
BLAIRS,

AGAINST

DAVID BLAIR.

PASSIVE TITLE.—GESTIO PRO HÆREDE.—*Where the intromissions of
the heir have been with a view of preserving the effects, no passive title
is incurred.*

AFTER the death of Bryce Blair, and his two sons William and George, who were proprietors of certain lands in the county of Dumfries, David Blair, their apparent heir, executed a deed, conveying the whole subjects to trustees, with powers to manage them, and also to sell what part was necessary for discharging the debts.

David Blair afterwards made up inventories with a view of entering heir *cum beneficio*, in virtue of the act 1695, chap. 24. His trustees also let a part of the lands, and for several years uplifted the rents; and they likewise sold some small parcels of land; but the sales were afterwards given up, the trustees not being in a situation to grant the necessary conveyances.

At last, after an interval of ten years, a process of ranking and sale was brought by the creditors, and David Blair claimed a considerable sum as due to him; when an objection was stated, That, in consequence of the proceedings already mentioned, he had become
liable

liable *gestione pro hærede* for the debts of his predecessors ; and therefore could not be allowed to enter into a competition with their creditors.

The question having been reported on informations, the Court were unanimously of opinion, That as, in those proceedings, David Blair had no view of appropriating the subjects, his purpose being that of discharging the debts due by his predecessors, no passive title had been incurred.

The Lords therefore “repelled the objection to the claim entered “for David Blair, and remitted the cause to the Lord Ordinary.”

Reporter, Lord Henderland.
Clerk, Mitchellson.

Att. Dean of Faculty.

Alt. Solicitor-General.

C.

N° CLXXIX.

May 14. 1791.

The MINISTER of the UNITED PARISHES of LITTLE
DUNKELD and LAGGANALLACHIE,

AGAINST

The HERITORS.

MINISTER.—GLEBE.—*The powers of the parish-minister over it.*

THE living of Little Dunkeld and Lagganallachie has two glebes annexed to it, one at Little Dunkeld, contiguous to the manse, and consisting of six acres of arable land, and two of pasture ; and the other about two miles distant, at Lagganallachie, containing about four acres, one half arable, and the other half pasture.

The yearly produce of the grounds at Little Dunkeld, cultivated in the ordinary way, could not be rated at more than 20 s. per acre. But being well adapted for the establishment of a manufacturing village,

lage, the minister, with the approbation of the presbytery, feued out several acres for a yearly payment of about L. 6 per acre.

Some of the heritors having considered this transaction as *ultra vires* of a parish-minister, the question came to be tried in a process of suspension; in which the minister

Pleaded: A parochial minister, it is true, is not proprietor of the glebe, which he holds partly as a liferenter, and partly as a legal administrator; but that does not hinder him, any more than it formerly did the dignitaries of the Romish church, or than it now does the administrators of the different corporations established for the advancement of trade or of learning, from entering into such bargains respecting the landed property belonging to these communities as are evidently beneficial; Act 1457, c. 21.; 1503, c. 91.

Thus, by the common law, the feuing of a glebe, when followed out with a proper attention to the interest of the living, is not prohibited. And on a just survey of the enactments on this head, they will be found as little calculated to restrain transactions similar to the present. The first of these, being 1563, chap. 72. prohibiting the granting of feus, or long leases, without the consent of the Queen then reigning, was merely temporary. The subsequent regulation of 1572, chap. 48. is directed only against alienations made by a minister, "in prejudice of his successors." And this more clearly appears from the enactment which followed, 1585, chap. 11. annulling those leases and feus alone by which the benefice was rendered of less value than before.

This is the opinion of one of the most eminent authors on the Scots law; Erskine, book 2. tit. 10. § 5. And in support of it, it may be farther observed, that although it might have been necessary, at the date of these enactments, to secure to the members of the national church those accommodations in point of living which then could only be had in the possession of a farm, it will now, in general, be more for their advantage to go to market for what they need, than to retain in their own occupation the scanty portion of land allotted to them, which the precariousness of their title prevents them from cultivating in a proper manner.

Answered: Glebes have been provided for parochial ministers, not so much for the purpose of increasing their incomes, as for their personal accommodation; and at the same time, for securing to their parishioners an example of frugal and judicious agriculture. Hence in determining the extent of the stipend to be given to a parish-minister, the circumstance of his having a glebe more or less commodious is never attended to. It would therefore be evidently contrary to the meaning of the legislature, if by any agreement that portion of land were to be converted to other uses.

But the present question does not depend upon loose and uncertain inferences; many positive regulations having been made for preventing all alienations of ministers glebes. Such is the statute of 1563,

which not only prohibits the feuing and letting of manfes and glebes without the Queen's consent, but provides that the person serving the cure shall, notwithstanding any fuch feus or leases, have a fuitable dwelling-houfe with as much land as is neceffary for his accommodation.

The fubfequent ftatute in 1572 declares in the moft general terms, "That it fhall not be leifome to the minifters prefent and to come, to fell, annailzie, fet in feu or tacks, or put any in poffeffion of the fame, in prejudice of their fucceffors, but the famen to remain always free, to the ufe and eafement of fick as fhall be admitted to ferve and minifter at the faid kirk." As to the enactment of 1587, which obliges all incumbents to find fecurity that they fhall not enter into any agreement by which the value of the living might be leffened, it cannot be fupposed to extend their powers in fuch a manner as to defeat the object which the legiflature had in view.

The question having been reported on informations, the Court in general were of opinion, that a minifter could not, in any cafe, grant feus of his glebe.

The Lords therefore "fufained the reasons of fufpention, and fufpended the letters *simpliciter*."

A reclaiming petition was preferred, but it was refufed without answers.

Reporter, *Lord Dunfinnan*.
Clerk, *Home*.

Act. *Robertfon, Procurator for the church*.

Alt. *Lord Advocate*.

G.

N° CLXXX.

N^o CLXXX.

May 19. 1791.

JEAN MACKENZIE,

AGAINST

WILLIAM MORISON.

MINISTER.—ALIMENT.—PERSONAL AND TRANSMISSIBLE.—*Annuities due to the widow of a Scots clergyman, in virtue of the act 17th Geo. II. c. 11. how far assignable.*

MR Morison, a minister of the established church, having in the year 1776 incurred an arrear of L. 40 to the collector of the fund provided by act 17th Geo. II. for the support of the widows and children of ministers, it was discharged by his son William Morison, upon getting an assignment from the collector. The son at the same time, in recompence of the risk he was supposed to come under, obtained from Jean Mackenzie, his father's wife, who was his step-mother, a deed conveying for ever to him, one half of the annuity to become due to her, after the death of her husband. The annuity amounted to L. 25 *per annum*.

Mr Morison senior, who was nearly of the same age with his wife, died in 1777, having run still farther in arrear; it was not till 1781 that it was cleared off out of the annuities due to the widow, which were retained by the collector.

In 1790, the sum of L. 40, advanced by William Morison, with the interest upon it, was also paid up.

Mrs Mackenzie, the widow, having then insisted that she should be at liberty to levy the whole of her annuity, notwithstanding the assignment, the question arose, how far the sums due in virtue of the statute of his late Majesty, could be assigned? For William Morison, it was

Pleaded: It has been provided, by act 17th Geo. II. that the sums thereby due to the widows and children of the established clergy, shall not be arrested; but from thence it does not follow, that they may not be transferred by a voluntary or onerous deed. In the same manner, the sums due by bills of exchange, though not affectable by arrestment, may be transferred by assignment. The reason of the exclusion is different in the two cases, the advantage of trade in the one, and the favour intended to the families of the national clergy in the other, having

having made way for an exception from the general rule: But as it would be injurious to commerce if bills of exchange could only be transmitted from one person to another by indorsation, so it would be no less inconsistent with the intention of the legislature, if onerous and voluntary bargains respecting these statutory provisions, made by the widows or children of clergymen, were to be altogether restrained.

Of that nature was the deed in question; the risk undertaken by the assignee in paying the arrears due by his father, on the chance of his mother-in-law's surviving him, being very great. The words, however, of the statute, appear to put an end to all dispute, it being declared, that the foresaid annuities, &c. "shall not be liable to any arrestment, but shall be paid to the children or widows themselves, or their executors, administrators, and assigns." It is to be noticed, too, that as a minister is only obliged to pay such a yearly rate as intitles his widow to an annuity of L. 12, every addition must be considered as voluntarily purchased by him, and therefore ought to be governed by the ordinary rules of law.

Answered: As the provision made by the act in the late reign for the families of the clergy cannot be attached by legal diligence, it would be singular if the purpose of the legislature could be entirely frustrated by the rash and improvident deeds of the parties themselves. On this head, however, no particular regulation was necessary, the general rule in Scotland, with regard to alimentary rights, being, agreeably to the Roman law, that they cannot, before the term of payment, be assigned, or conveyed away, by any deed, whether onerous or gratuitous. So the law is laid down by all our authors, ancient and modern; and the propriety of it is evinced by the circumstances of the present case.

It was not necessary, for securing the annuity due to the widow, that the arrears should be paid in the manner here followed, the collector having been authorised to levy as much of the stipend as might be necessary for the purpose. The whole transaction, therefore, ought to be considered as a *donatio inter virum et uxorem*, which at any time may be revoked. The extent of the annuity, it is to be farther remarked, cannot have any influence, the legislature having made no distinction; and as to the expression of *assigns*, occurring in the statute, and joined to those of *administrators* and *executors*, it is to be considered as relating to deeds with regard to aliments already due; L. 8. D. *de Transactionibus*; Voet. lib. 2. tit. 15. § 14.; Dirleton, *voc.* Aliment; Craig, lib. 1. dieg. 15. § 7.; Stair, book 3. tit. 1. § 2.; Bankton, book 1. tit. 6. § 14. book 3. tit. 1. § 19.; Erskine, book 3. tit. 5. § 2.; Dictionary, vol. 1. p. 36. vol. 2. p. 76.; Stair's Decisions, 22d Dec. 1676, Dict; Kilkerran, *voc.* Aliment, p. 21. 15th Dec. 1738, Urquhart.

The Lord Ordinary, "in respect of the circumstances of the case," determined the cause in favour of Mr Morison.

A reclaiming petition was preferred by the widow, which was followed with answers.

The Court appointed memorials to be given in on the point, "how far the annuities due to the widows of ministers might be assigned."

And this having been done,

The Lords altered the judgement pronounced by the Lord Ordinary; thus determining the general point, that the funds secured to the families of ministers, by act 17th Geo. II. cannot, before the term of payment, be transferred for any cause whatever.

Ordinary, Lord Ankerville. Act. Elphinstone. Alt. Honyman. Clerk, Home.

C.

N^o CLXXXI.

May 25. 1791.

DAVID ALLAN, and others,

AGAINST

JAMES MACRAE.

TITLE TO PURSUE.—SOCIETY.—*An action sustained at the instance of parties, who had united themselves into a society, under the title of Bereans, for religious purposes.*

A Number of people in the parish of Fettercairn, in Kincardineshire, who formed themselves into a religious society, under the denomination of *Bereans*, and chose Mr Macrae for their pastor, purchased a piece of ground, on which they erected a place of worship, the whole expence being defrayed by the voluntary contributions of the members. The property having been acquired in the name of a committee of their number, as trustees for the congregation, the feudal right was vested in these trustees by investment.

Afterwards, however, a schism happened in this congregation, a part of them adhering to Mr Macrae, and another part renouncing

all connection with him ; in consequence of which, the question came to be agitated in a process of declarator, at whose disposal the property of the society should be.

The Lord Ordinary reported the cause ; when

The Court, contrary to the decision in the case of Gib's meeting-house in 1752, and agreeably to those of Jobson in 1771, which related to a Seceding meeting-house at Dundee, and of Smith in 1779, respecting a meeting-house at Falkirk,

“ Found, That the feu-right obtained by David Allan and others, as managers for building a meeting-house for divine worship, was a trust in their persons, for behoof of the contributors for purchasing the area, and building the meeting-house in question ; and that the said trustees are bound to denude themselves of said trust, in favour of the said contributors, or the majority of them, or managers named by the majority.”

Reporter, Lord Dreghorn.
Clerk, Sinclair.

A&A. Solicitor-General, Steuart.

Alt. Dean of Faculty, Gillies.

S.

N° CLXXXII.

May 31. 1791.

ALEXANDER MILNE,

AGAINST

FREEHOLDERS of ABERDEENSHIRE.

MEMBER OF PARLIAMENT.—Act 16th Geo. II.—*Competent, after the four kalendar months, to try the objection of Nominal and fictitious.*

MR MILNE had stood on the roll of the freeholders of Aberdeenshire for many years, without having suffered any *change of his circumstances*, when an objection made to his qualification, as being nominal and fictitious, was sustained by the freeholders.

In

In consequence of this, he preferred a complaint to the Court, founded on the following clause of the statute 16th George II. : " If
" any person shall be inrolled, whose *title* shall be thought liable to
" objection, it shall and may be lawful for any freeholder standing
" upon the said roll to apply, by summary complaint, to the Court
" of Session, &c. ; so as such application be made within four kalen-
" dar months after such inrolment, &c. ; and if no such complaint
" shall be exhibited within the time aforesaid, the freeholder inrolled
" shall stand and continue upon the roll, *until an alteration of his cir-*
" *cumstances* be allowed by the freeholders as a sufficient cause for
" striking or leaving him out of the roll." The freeholders, on the
other hand, to obviate this argument,

Pleaded : The statute of 1681 empowered the Court of Session, during the recess of parliament, to determine summarily concerning objections made to the votes of freeholders standing on the roll ; but without creating any limitation as to the time of bringing forward those objections.

After the union of the two kingdoms, when the idea of nominal qualifications was first conceived, a trust-oath was introduced by act 12th of Queen Anne, while in other respects the power of objecting remained as before.

An oath more comprehensive than the former was authorised by 7th George II. ; but still no limitation in point of time, nor any repeal of act 1681, took place.

The statute 16th George II. followed next ; and it remains to be considered, whether it produced an alteration in that respect, effecting a repeal of all the antecedent statutes, and of the common law.

Objections relative to a person's connection with the lands on which he claims to be inrolled as a freeholder, may not only be directed against his right and title, which are *juris*, but against other matters, which are *facti*. Of the latter, the circumstance of possession affords a plain example, which, though an essential ingredient in a freehold-qualification, involves neither right nor title. Nominality belongs evidently to the same class. Like possession, it is not *juris*, but *facti*, and has no reference to right or title.

These two sorts of objection are clearly distinguished by this important particular, that while, on the one hand, whatever regards the title may be fully discovered within a short period, by examination of the title-deeds ; the nature of the possession, or the fictitious quality of the freehold, on the other, may unavoidably be kept secret for a great length of time.

It cannot then be supposed, that this statute was meant to include in the limitation of *four months*, though fully sufficient for one inquiry, another quite different, to which any given period, and especially so short an one, might naturally prove altogether inadequate.

The object of the trust-oath authorised by 7th George II. which has no relation to the validity of titles, is to ascertain the fact of possession, and of the real or nominal nature of qualifications. Accordingly

dingly this mode of inquiry, to which, it is an undisputed point, the limitation of *four months* has no reference, may be put in practice at any time: A thing which of itself seems decisive of the present question; because it tends to show, that the statute now under consideration is not applicable to objections of that nature. And as it is now established, by the judgement of the House of Lords in the case of Macpherson *, that the objection of nominal and fictitious may be verified *prout de jure*, as well as by the trust-oath, it seems to follow as a consequence, that those other means may in like manner be employed at any time, independently of the statutory limitation. In other words, as the statute 16th George II. has not in this respect repealed that of 7th George II. so it has as little repealed the common law concerning objections to the votes of freeholders.

Nor are the terms of the statute in question inconsistent with this view of its meaning. For though it limits to *four months* the time for exhibiting complaints against inrolment, unless there be an alteration of *circumstances*; yet it is plain, that this expression relates only to *rights and titles*, as expressed in other parts of the statute, which are truly the title-deeds, and *juris*, and not to the other class of objections, which are *facti*.

Answered: As the objection of *nominal and fictitious* is so general as to comprehend almost every other, it is obvious, that if this were not excluded after the *four months*, the statutory prescription, enacted for the most salutary purposes, would in effect be totally abrogated.

Accordingly, in the terms of this statute, which are plain and express, there is not room left for any such idea. The words, as above quoted, are, "Any person whose title shall be thought liable to objection," and also in another part of the same passage, "A person who had not a right to be inrolled;" than which surely no form of expression could more clearly denote the objection of nominal and fictitious.

Thus, let it be supposed, that within the four months a complaint, under the authority of the clause of the statute cited above, should be brought against a person inrolled, because his title is nominal and fictitious, or brought at the instance of one who has been struck off the roll, in consequence of a pretended objection of nominal and fictitious: would it not be absurd to say, that this clause did not apply to that objection, which in effect would be to deny altogether the competency of such complaint? For at common law the Court has no jurisdiction over the rights of freeholders in questions of election.

But if it does apply to that objection, then the unavoidable consequence is, that the subsequent part of the clause must in like manner apply to it; for surely no words can be more express than these: "So as such application be made within four kalendar months after such inrolment."

* See p. 121.

May 1791.

COURT OF SESSION.

371

The Court “found the objection of *Nominal and fictitious* competent to be proponed after the lapse of *four kalendar months*.”

To this judgement, on advising a reclaiming petition, and answers, the Court adhered.

For Mr Milne, *M. Ross, et alii.*

Alt. *Wight, et alii.*

Clerk, *Gordon.*

S.

Similar judgements were afterwards given in various other cases.

Nº CLXXXIII.

June 1. 1791.

CATHARINE MACKENZIE, and others,

AGAINST

ROSS and OGILVIE, and others.

ADJUDICATION. — Ranking of Adjudgers. — *Lands being disposed a me, or de me, and a base infeftment taken; a creditor of the disponee, in order to render his adjudication the first effectual one, may throw into his signature of adjudication a clause of confirmation; and this though the right of superiority has been before effectually adjudged by a creditor of the disposer.*

THE late Roderick Mackenzie being regularly infeft as a crown-vassal in the lands of Redcastle, executed a conveyance thereof, in favour of himself in liferent, and of Kenneth Mackenzie, his eldest son, in fee.

This conveyance contained a precept of feisin *a me*, as well as *de me*, and a procuratory of resignation; and Kenneth Mackenzie, the disponee, immediately proceeded to take a base infeftment; but he neither obtained a charter of confirmation from the Crown, nor executed the procuratory of resignation.

5 B

Both

Both old Redcastle, who died in 1786, and his son, owed large sums; and in the years 1788 and 1789, their common creditors adjudged the property of the lands of Redcastle, as vested in the person of the son, and the superiority, as *in hæreditate jacente* of the father, upon special charges.

In order to obtain to their adjudications the privilege of being the first effectual, the creditors pursued different measures.

Catharine Mackenzie having, along with those whose adjudications had been conjoined with hers, obtained in Exchequer a charter of adjudication of the superiority, proceeded to infest herself *qua* vassal in the property.

Mess. Ross and Ogilvie, on the other hand, obtained in Exchequer a charter of adjudication, which contained a clause of confirmation, whereby it was intended to consolidate the property and superiority.

The signature of adjudication presented by Mrs Mackenzie, &c. was prior to that of Mess. Ross and Ogilvie; and as it unquestionably rendered her adjudication the first effectual one as to the superiority, she maintained, that the subsequent proceedings of these gentlemen, in applying to the Crown for a confirmation, were irregular and inept; and that the infestment in the property granted by her to herself was sufficiently authorised. In support of these propositions, she

Pleaded: The right of superiority in old Redcastle, and the right of property in his son, were two distinct and separate estates, which their respective creditors might attach for their payment. The former of these was accordingly attached by Catharine Mackenzie, and those who concurred with her, as creditors of old Redcastle, by charter of adjudication, followed with infestment. These proceedings would have been an effectual bar to young Redcastle's attempting, by confirmation, or by executing the procuratory of resignation, to consolidate the property with the superiority; and they must prove equally fatal to the measures pursued by Mess. Ross and Ogilvie, in order to accomplish the same purpose. Indeed, to suppose, after the right of superiority had been duly transferred to a subject, whether by voluntary or judicial alienation, that it could be exercised by the Crown, would be quite inconsistent and absurd; Stair, book 2. tit. 3. § 28.; Hope's Min. Pract. p. 62. § 151. 152. 1st December 1738, Ramsay of Wyliecleugh *contra* Brownlees, 27th January 1756, Creditors of Tulloch.

Answered: If young Redcastle had been desirous of holding the lands of the Crown, he might have applied for a charter of confirmation; and thus he would have united in his person both the property and superiority. A creditor of young Redcastle, after being instated in his right by adjudication, could pursue no other course.

It is true, that as the right of superiority, till it was, in the way above described, transferred to young Redcastle, continued in the person

person of the father, or after his death in his *hereditas jacens*, it might be attached for his debts; and so the adjudication led by Mrs Mackenzie, &c. having been followed out before any application for confirming by his son, or his creditors, must so far be considered as the first effectual one. But this adjudication can be considered only as an incumbrance, or *pignus præterium*, the right of superiority itself still floating between the father and son, till it was by confirmation effectually vested in the latter, or those deriving right from him.

From this it is evident, that as the infeftment granted by Mrs Mackenzie to herself was altogether inept, an adjudger before the expiration of the legal having no right of entering vassals, so it was still competent to apply to the Crown for a confirmation of young Redcastle's base infeftment, in the same manner as if no diligence had been used for attaching the right of superiority. The authorities quoted on the other side relate to a period in the law of Scotland when the diligence of apprising was used, which was truly a judicial sale, under a faculty of redemption. And although it be true, that with regard to the bygone arrears in an adjudication, the same doctrine has been admitted, in all other respects, an adjudication before the expiration of the legal is now viewed in a quite different light; Stair, book 2. tit. 10. book 3. tit. 2. § 29. 30. 38.; Erskine, book 2. tit. 7. § 15.

Mrs Mackenzie had also charged the heirs of old Redcastle, his eldest son having died, to give her infeftment in the property. But as before this the signature for Mess. Ross and Ogilvie had been presented, it could be of no use, unless Mrs Mackenzie could have shown, that there was some irregularity in their proceedings.

The Court were unanimously of opinion, That the adjudication of the superiority by Mrs Mackenzie was no bar to the subsequent confirmation obtained by Mess. Ross and Ogilvie; and they were equally clear, that the infeftment granted by Mrs Mackenzie to herself was quite unauthorized.

The Lord Ordinary had found, That the adjudication at the instance of Catharine Mackenzie is the first effectual adjudication *quoad* the superiority; but that the adjudication at the instance of Mess. Ross and Ogilvie is the first effectual one *quoad* the property.

And, after advising a reclaiming petition, which was followed with answers,

The Lords adhered to the Lord Ordinary's interlocutor.

Another reclaiming petition was preferred; but it was refused without answers.

Lord Ordinary, Lord Justice-Clerk.
Clerk, Home.

Act. Honyman.

Alt. Abercromby, M. Ross.

C.

N^o CLXXXIV.

N° CLXXXIV.

June 1. 1791.

SUSANNA VERE,

AGAINST

The EARL of HYNDFORD, and others.

SOLIDUM ET PRO RATA.—TUTOR.—*The consent of a tutor named sine quo non is necessary to every act of administration, though he cannot do any thing in opposition to the other tutors.*

THE late Mr Vere of Stonebyres having an only son, made a nomination of tutors and curators to him, in the following terms.

“ I appoint the said Susanna Vere, *alias* Ogilvie, my spouse, Thomas Carmichael, Esq; of Maullslie, (now Earl of Hyndford,) John Hamilton, Esq; of Westburn, William Porteous, Esq; of Carmacoup, John Bannatyne, Esq; of Castlebank, and Robert Bell clerk to the signet, to be tutors and curators to the said Daniel Vere, my only son, during the whole years of his pupillarity and minority: And I hereby appoint three, or the majority of the above-named persons accepting and surviving, to be a quorum; the said Susanna Vere, while a widow and in life, being always one, and *sine qua non*.”

After Mr Vere's death, the whole persons named as tutors undertook the office. A difference, however, soon occurred between them; and the authority of Mrs Susanna Vere, the widow, who had been named *sine qua non*, being disputed, mutual actions of declarator were brought by the parties, for ascertaining their several powers.—For the other tutors it was

Pleaded: After the death or incapacity of a tutor named *sine quo non*, it has been held, that the whole nomination must fall to the ground, the intention of the testator appearing to exclude the other tutors from acting, when the one in whom he placed his chief confidence is no longer in a situation to fulfil the duties of the office. But it does not from thence follow, that the tutor *sine quo non* must approve of every act of administration. In this way, the nomination of the other tutors would become wholly useless.

It is true, that the writers on our law lay it down, in general terms, that without the concurrence of the tutor *sine quo non*, no act is valid. But
the

the mistake which this want of precision might occasion is obviated by Lord Kames, who observes, that "where a number of persons are named jointly to execute any office, though they all must *concur*, it follows not, that they must all *agree*. If they be all present, the will of the party naming them is fulfilled, and the opinion of the majority must govern the whole body." In the present case, it should seem, that the nomination of the widow as *sine qua non* only applied to the case where a majority of the tutors were present; and that where the whole were assembled, she had no greater power than the other tutors; Principles of Equity, p. 254. l. 17. § 7. D. *De receptis qui arbit.*

Answered for the Widow: The evident meaning of a nomination of a tutor *sine quo non* is, that no act shall be valid without his approbation. Hence it has been found, that upon the death or failure of a tutor named in this manner, the tutory is at an end. And surely, if the authority of the other tutors is thought to be completely done away where the tutor *sine quo non* is unable to act, it cannot be thought that the whole administration may be conducted in opposition to his opinion. The authority of Mr Erskine is decisive, that no act is valid without the special concurrence of the *sine quo non*; and Sir George Mackenzie says, "That where there is a tutor *sine quo non*, he must always be one of the managers and *consenters*." The argument from the terms of the present nomination is evidently erroneous; the authority of the widow, as a tutor *sine qua non*, not being annexed only to the proceedings of the quorum named by the testator, but to the nomination itself; Erskine Inst. l. 1. tit. 7. § 7.; Sir George Mackenzie, l. 1. tit. 7.; Kilkerran, 16th June 1742, Lord Drummore.

After advising memorials,

The Lords found, "That though Mrs Vere cannot act as tutor or curator by herself, yet that she has a negative on the actings of the other tutors."

And after advising a reclaiming petition, with answers, the same judgement was given.

Reporter, Lord Swinton.
Clerk, Mitchellson.

For the widow, John Dickson.

For the other tutors, Ro. Hamilton.

C.

N° CLXXXV.

June 7. 1791.

REBECCA HOG,

AGAINST

THOMAS HOG.

FOREIGN.—LEGITIM.—SUCCESSION—*Of moveable effects, situated in a foreign country, whether testate or intestate, regulated by the Lex domicilii.*

THE father of Thomas and Rebecca Hog, having his domicile in Scotland, died possessed of a large personal estate situated in England, which by a deed of settlement was conveyed to Thomas.

As childrens right of legitim is not acknowledged in England, it came to be a question between Rebecca, by whom the legitim was claimed, and Thomas the disponent of the effects, by what law the succession to that English property was to be regulated, whether by the *lex loci rei sitæ* which rejected, or the *lex domicilii* which recognized the claim of legitim. In an action against Thomas, at the instance of Rebecca, the defender

Pleaded: The power of alienation is inherent in the nature of property. This evidently implies that the proprietor can alienate, either absolutely or *sub modo*, which is the same thing as to say, that he can immediately transfer his right by a deed *inter vivos*, or by a testamentary settlement destine it, under the condition, that until his death the subject shall not be enjoyed by the donee; *Grotius, De jure bell. ac pac.* Stair, b. 3. tit. 4. § 2.

Legal succession being therefore plainly subsidiary to the testamentary, is necessarily, in default of express will declared by testament, founded on presumed will, or that which it is presumed either was exercised, or would have been, had circumstances permitted; *Grot. ibid. lib. 2. cap. 7. § 3.*; *Puffendorff, De Jur. Nat. et Gen. lib. 4. c. 11. § 1.*; Stair, b. 3. tit. 4. § 3.

Retraints, indeed, have by some states been imposed on the will of proprietors in the disposal of their property; but being adverse to the nature of that right, they ought ever to receive the strictest interpretation. By the law of the Twelve Tables, the natural right of disposing by will, was acknowledged in its fullest extent: *Uti quisque legasset super re sua, ita jus esto.* And such is the law of England, although anciently

ly it admitted the same restraints as that of Scotland; Blackstone, vol. 2. p. 402.

When effects are situated in a territory different from that in which the deceased proprietor had his domicil, that presumed will which ought to regulate his intestate succession may be inferred, either through the medium of the *lex loci rei sitæ*, or of the *lex domicilii*, according as the rules of either may appear most likely to be adopted, though the circumstance of apparent acquiescence is peculiar to the last. But in the case of a testamentary settlement, there is no room for presumption; and to this declared will, the *lex loci rei sitæ* will give full effect, even when by the *lex domicilii* restraints may have been imposed; as these, for the reason already given, are to be confined within its own territory.

Indeed this is no more than equivalent to what is clearly permitted. By a mere variation of mode or form, a proprietor may accomplish his purpose of transmitting his property after his death, when otherwise he would have been restrained by the law of his domicil. But by the act of placing that property in a country where the alienation is free from such shackles, a variation surely not less effectual is produced.

It would be singular, if the law of the domicil were to operate thus against express will. A person may have a domicil in a foreign country, for an occasional and temporary residence, with the laws or institutions of which his connection is so extremely slight, that it would be hardly reasonable to regulate, according to them, even his *intestate* succession. But in the case of *testate* succession, it would be palpably unjust. To justify such a restraint on the disposal of property, it is necessary that some obligation of that tendency on the proprietor should have been previously created. Now, on that supposition, there must be a wrong implied in any change of a domicil, by which the obligation would be defeated. But there is here evidently no wrong, which proves the non-existence of any such obligation.

With respect to authorities, some foreign writers, adopting the fiction expressed by the terms *mobilia non habent situm*, have thence inferred, that the law of the domicil ought to regulate succession. But a fiction destitute of any legal sanction, as that is in this country, is to be regarded merely as a falsehood; and though the opinions of those authors, the Civil law being quite silent on the point, refer to the local usages of certain German or Belgic states, these usages are by no means uniform in this matter. The following authorities confirm the doctrines now maintained; Voet. *ad Pand.* lib. 1. tit. 4. § 2.; *Idem, de Statutis*, § 11. 9. 2. 7. 8.; *Id. ad Pand.* lib. 28. tit. 1. § 44. lib. 48. tit. 20. § 7.; Christen. *ad leg. Mechlin.* p. 529. 530. 565. 563.; Peck. *de test. conjug.* lib. 4. c. 18. And Huber. *de jur. Civil.* lib. 3. § 4. tit. 1. § 22. 23. expresses himself thus: "*Si testatores vel contrahentes clavis verbis expresserint, quid de rebus immobilibus fieri vellent, tum ratio juris gentium postulat, ut voluntas effectum suum habeat, ubicunque sitæ sunt mobilia immobilesve; cum nihil, tam naturale sit, quam ut voluntas domini, volentis rem suam in alium transferri rata habeatur, ut ait Justinianus in § 40. Instit. de A. R. D.*"

On such principles, it may be determined what the law of any particular country in this respect ought to be; and it will now appear that the law of Scotland is regulated by those principles. Thus Lord Stair lays it down, "that the law of Scotland regulates the succession and rights of Scotsmen in Scotland, though dying abroad being resident there." b. 1. tit. 1. § 16.; and Bankton says more explicitly, that the *lex loci rei sitæ*, not the *lex domicilii*, is the rule both in testate and intestate succession, b. 1. tit. 1. § 82. 83.

In the case of Purves *contra* Chisholm, it was found, that goods in Scotland belonging to a bastard, a Scotsman, domiciled in England, fell under *escheat* contrary to the law of the domicil, Haddington, 1st February 1611.

In those of Henderson, 9th December 1623, and of Melvill, 16th July 1634, the succession of effects in Scotland was regulated by the *lex loci rei sitæ*, in opposition to the *lex domicilii*; and the decisions, as it appears from their terms, proceeded on the general principle, although the subjects were heritable bonds, or bonds bearing annualrent, then also deemed heritable.

On the same principle was the decision, 16th June 1656, during the Usurpation, Craig *contra* Lord Traquair; and in that of Lewis *contra* Shaw, 19th January 1665, a nuncupative testament, made by a person domiciled in England, was found not to be effectual to carry moveable property in Scotland; Stair. Gilmour.

Of a similar tendency are Dirleton, 19th July 1666, Bisset *contra* Brown, Dict. vol. 1. p. 318.; Dingwall *contra* Vendome, 1st July 1619; Archbishop of Glasgow *contra* Burntsfield, March 1683; Dryden *contra* Elliot and Ainslie, March 1684; Gray *contra* Earl of Selkirk, 22d July 1708.

As to the case of Brown *contra* Brown, 28th November 1744, though admitted as an authority, it would not affect the argument on *testate* succession; and it was soon disapproved of by the Court. See Kilkerran, *vac.* Foreign, p. 211. Contrary judgements were given, 1st February 1770, Lorimer *contra* Mortimer, 13th January 1778, Elcherfon *contra* Davidson; *eod. die*, Henderson *contra* Maclean; 19th January 1785, Morris *contra* Wright; 15th November 1787, Hay and others *contra* Scott.

Answered: The prevalence of the *lex domicilii* is founded on the rights of nations. Their wealth is but the aggregate of that of all their people, in which it is plain every state must have a right, not to be altered by mere local situation; excepting landed property, which must ever remain subject to the law of the territory; and therefore the succession of moveable effects, wherever situated, is to be governed by the law of the state to which the proprietor belongs, or by the *lex domicilii*.

The same conclusion is to be inferred from the inconsistency attending the opposite supposition, when moveable effects are situated in various countries, with whose institutions the owner is unacquainted. He could then form no judgement, were he even to make a will, of what would be the destination of his property after his death. On such grounds, authors treating of the general principles of law, have founded

ed their opinions. Vattel, liv. 2. chap. 8. § 110. 111.; Puffendorff, *ed. par Barbeyrac*, liv. 8. chap. 5. § 3.; Ulric. Huber. lib. 1. tit. 3. § 2. 3. 5. 9. 10. 12. *et seq.*; Voet. *ad Pand.* lib. 1. tit. 4. lib. 38. tit. 3. § 17. lib. 5. tit. 2.; Peckius *de testam. conjug.* lib. 4. c. 35.; Zoes. *ad Pand.* lib. 28. tit. 1.; Denifart. Collect. de jurisprudence. *voc.* Domicil, § 3. 4. The same is the doctrine of the law of England, and so stated by Chancellor Hardwicke, Vezey's Reports, vol. 2. p. 35.

It is not from any respect to a presumed will, that this preference is given to the *lex domicilii*. In the opinion of the most eminent writers, such is not the principle of intestate succession; nor is the right of *testamenti factio* a result of the law of nature, but entirely *juris civilis*, or, in other words, dependent on the interposition of municipal law, Puffend. l. 4. c. 10. § 14.; *Esprit des loix*, liv. 26. chap. 6.; Bynkersh. *Observat. jur. Rom.* lib. 2. c. 2.

But in respect to the legitim, which is truly a right of property in the children, it is peculiarly vain to argue concerning presumed will. In early society, a father is only a joint proprietor of the family-stock, which being gained by the united labour of husband, wife, and children, pertains of right also to the two last. Hence both the *legitim* and *jus relictæ* in their original nature, as well as their present form, are rights of property; and in this view they must appear equally sacred in all countries; Kames, Hist. Law-Tracts, N^o 3. l. 11. ff. *de liber. et posthum. hæred.*; Erskine, b. 3. tit. 9. § 16.; Stair, b. 3. tit. 8. § 44.; Dirleton, *voc. Legitima liberorum*; *Reg. Majest.* lib. 2. cap. 37.

That the law of Scotland bestows the same preference on the *lex domicilii*, as appears in other systems of jurisprudence, is next to be shewn. In the statutes of William, chap. 30. a plain distinction is made between the succession of effects in Scotland belonging to strangers, and those of natives. The act of parliament 1426, c. 88. ordains, "quod causæ omnium mercatorum et incolarum regni Scotiæ extra regnum decedentium, debent tractari coram suis ordinariis infra regnum a quibus sua testamenta confirmantur; non obstante quod quædam ex bonis hujusmodi decedentium, tempore sui obitus fuerunt in Anglia, vel in partibus transmarinis." Steuart, in his Answers, *voc.* Strangers, lays it down, "that *mobilia* or *nomina* in this country, belonging to strangers, do transfer according to the law of the country where the owner resides and dies." And Mr Erskine, in the most positive terms, declares for the *lex domicilii*, b. 3. tit. 9. § 4.; as does Lord Kames, Prin. of Eq. b. 3. c. 8. § 3.

Nor are the decisions of the Court of a different tendency. That in the case of Purves was governed by the *lex originis*, which was often not distinguished by the *lex domicilii*, and not by the *lex loci rei sitæ*; which might also be said of those of Henderson and Melville, if they had been in point, or had not related to heritage; as it may of those of Craig and Lewis.

At the same time, it is to be observed how fatal those decisions, though considered as authorities for the *lex loci rei sitæ*, would be to the argument in favour of testate succession; because then that law would have prevailed against a will, and this being once admitted, the same effect could not be denied to the *lex domicilii*.

The cases of Bisset, the Archbishop of Glasgow, Dryden, and Gray, do not relate to succession. But the decision, *Brown contra Brown*, 28th November 1744, is directly in point, and in favour of the *lex domicilii*; while that of Lorimer was in favour of the *lex originis*. The first judgement in opposition to the *lex domicilii* was given in the case of Elcherfon. But it was founded on an erroneous opinion of Sir Dudley Rider, relative to the succession of Alexander Lord Banff, "that his effects situated in England must be governed by the law of that country." The mistake, however, was made known by the Lord Chancellor Thurlow's opinion in the case of Bruce, and must now for ever cease to operate; 25th June 1788.

The Lord Ordinary's interlocutor was the following: "Finds, that there is no ground for distinguishing between Scots and English effects; because the succession to a defunct's effects ought to be regulated, not by the different laws of the many different countries in which these may happen to be locally situated at the time of the death, but by the law of the domicil, and because it has been in several cases so determined in England."

On advising a reclaiming petition and answers, the Court pronounced this judgement: "Find, that the pursuer's claim of legitim can in no degree affect the moveables not situated in Scotland at the time of her father's death."

A petition against this interlocutor having been presented, and followed with answers, the Court appointed a hearing in presence.

By some of the Judges, who dissented from the opinion of the majority, it was observed, that in testamentary succession there is no room for the preference of the *lex domicilii*, which is founded on the *presumptio voluntas*, that is, the principle of succession *ab intestato*; that the fiction of *mobilia non habentia situm*, (which is so far reasonable, that moveables may be naturally supposed *in transitu* to the owner's domicil, so as not to have a permanent *situs* abroad), being framed in aid of that presumption, cannot operate against express will; that as Mr Hog might by other means have defeated the claim of legitim, so he effected the same end, by placing the subject of it in a territory where no such burden is known; that this exclusion of the legitim is similar to what would have happened in former times in regard to the quot, by the transporting of moveables to a country where no such exaction prevailed; or in the case of a local tax imposed on goods, if they were removed to a different territory.

The majority of the Court seemed to be of opinion, that the right of legitim, though during the father's life it be subject to his power of defeating its object, yet that power not having been exercised, it becomes at his death the same perfect or absolute right, as if it had never existed under such a condition, and like any other right of property, ought to have its effect every where.

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The judgement of the Court, to which they afterwards adhered on advising a reclaiming petition and answers, was as follows.

“ The Lords find, that the succession to the personal effects of the deceased Mr Hog, wherever situated, must be regulated by the *lex domicilii*, and therefore they alter the interlocutor reclaimed against: Find, that the petitioner’s right of legitim extends to such personal effects in England, or elsewhere, as well as in Scotland.”

Lord Ordinary, *Dreghorn.* A&C. Solicitor-General, *Wight, Jo. Clerk.* Alt. Lord Advocate,
Dean of Faculty, *G. Fergusson, M. Rofs.* Clerk, *Sinclair.*

S.

N° CLXXXVI.

June 7. 1791.

REBECCA HOG,

AGAINST

THOMAS HOG.

LEGITIM.—IMPLIED ASSIGNATION.—*One or more of the children in familia having renounced the legitim, their shares fall to those who have not renounced.*

THE father of Thomas and Rebecca Hog had six children, three sons, of whom Thomas was the eldest, and two daughters, beside Rebecca. On the younger sons and the daughters he made provisions; and from all of them, except Rebecca, having given the securities in his lifetime, he received discharges, and renunciations of their legitim. Rebecca had offended him by her marriage; and tho’ he intended to make her portion equal to that of her sisters, who had married with his approbation, he did not chuse to advance it to her, or settle it irrevocably during his life; by which means she had not the occasion of renouncing her legitim, as all the rest had done.

On the death of the father, two of the other children being predeceased, it came to be a question between Rebecca, and Thomas his heir, who was also his general disponee, whether she, who alone had not renounced her legitim, and who now repudiated the provision destined

destined for her by her father, was intitled, unquestionably contrary to his intention, to claim a full half of his moveables under that denomination, or only one third of such half, while the shares of the other two surviving children accresced by their renunciation to Thomas, in the room of his father. In an action at the instance of Rebecca, to enforce her claim to the half of the moveables, she

Pleaded : The present question relates to the effect of the renunciation of legitim by a part of the children entitled to it, whether the father is to be considered as having purchased their shares, so as proportionally to encrease the *dead's part*, or to give him, as coming into their place by implied assignment, the absolute power of disposal of them ; or if the portions of the renouncers, still remaining in the same situation as the rest of the legitim, will fall to the child or children who have not so renounced.

The legitim resembles a right of property. Though a husband, from his power of administration, may waste the goods in communion, in the same way as any other part of his fortune, and so impair or annihilate the subject of the legitim ; yet he cannot, by a testamentary deed, or even by a deed *inter vivos*, if calculated for that end, disappoint his children of their shares, which they take, not as in right of succession, but *proprio jure*.

When a father, in giving portions to his children, obtains a renunciation of the legitim, it is plainly nothing but a transaction, by which they receive their shares, or what is held as equivalent, by anticipation, the fund for division as at the father's death being thus proportionally diminished. If, therefore, the father's dispositive were then entitled to claim the shares of the children who had renounced, the consequence would be, that having been already advanced by the father, they would be doubly paid. For in such a case there could be no room for collation ; the law not requiring collation by a dispositive.

Nay, were the effect of this renunciation, or of a virtual assignation to the father, of the shares renounced, such as to separate the renouncers proportions from the rest of the legitim, they would still be comprehended among his moveables, and suffer the division belonging to that aggregate fund.

The effect of renunciation of legitim is therefore the same as that of the death of the renouncer ; so that if all the children renounce, the whole goods in communion become *dead's part*, or fall also under the *jus relictæ* ; and if only some of the children be thus forisfamiliarized, the whole legitim must be drawn by such as remain *in familia*. In the same manner, when a wife renounces her *jus relictæ*, this, instead of encreasing solely the powers of the husband, renders the subject of it liable to the legal division between father and children.

Accordingly, in the *instructions* framed in 1666, for the guidance of the Commissaries in the confirmation of testaments, the *dead's part* is always held as either *a half* or *a third of the free gear*, no idea, it is plain, being entertained of increasing the *dead's part* by transacting with the children ; for then it would hardly have passed unnoticed

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ced by those dignitaries of the church, who were both the framers of the instructions, and the very persons to whom the *quot* was payable. And it is also clearly there laid down, that in the case of all the children being forisfamiliated, the division should be bipartite; whereas, were the father to stand in their place, it would rather be tripartite, as he would be intitled to two thirds.

All the other authorities of our law equally coincide in establishing the same doctrine; and some, by implication or by analogy, as *Nisbet contra Nisbet*, 18th January 1726, Kilker.; *Falcon*. 22d February 1749, *Martin contra Agnew*; *Fac. Coll.* 7th January 1762, *Jervey contra Watt*: And some of them directly, as *Stair*, b. 3. tit. 8. § 46.; *Bankton*, b. 3. tit. 8. § 15.; *Erskine*, b. 3. tit. 9. § 23.; *Stair*, 17th February 1671, *Macgill contra Viscount of Oxenford*; *Dict. voc. Legitim*, June 1728, *Henderfon contra Henderfon*, 29th July 1768, *Sinclair contra Sinclair*.

Answered: The legal division of a defunct's moveable estate may be properly denoted by saying, that the wife receives a half, if there be no claim for legitim, and the children a half when the *jus relictæ* is not claimed. When, therefore, a wife relinquishes her *jus relictæ*, or when the whole of the children renounce the legitim, the legal division is necessarily bipartite, the claim of *jus relictæ* in the one case, and of legitim in the other, being extinguished. But if the right of legitim has been renounced by only a part of the children, that claim still subsists, and by consequence produces a tripartite division. Those however, who have not renounced, can only have a title to their respective shares; and when these are obtained, they suffer no loss from the disposal of the shares of those who have renounced.

The case is the same as if a father, for value given by him, were to stipulate with one of his children, that he should apply in a certain manner his portion of the legitim, or that he should allow a nominee of the father's to draw it in his stead; a bargain to which it is plain neither the relict nor the rest of the children could make any legal objection. It is, besides, obviously equitable, that a father who gives for his child's renunciation a value which is absolutely his own, so that he may employ it in any other way he chuses, should reap the benefit of his purchase, which indeed is also a casual benefit, dependent on the child's surviving.

The idea of a share's being thus twice drawn, as if collation were then excluded, is erroneous; because a disponent, as well as a child, would be bound to collate; and, at any rate, the hardship would be no greater than if the father had exerted his power in another way, by declaring, that notwithstanding the payment of a provision, the child should remain *in familia*.

With respect to the authorities quoted by the claimant, the cases of *Nisbet* and of *Jervey* respect the renunciation of the *jus relictæ*, which it is admitted does not convey the right to the husband.

In those of *Macgill*, of *Sinclair*, and of *Martin*, the natural presumption was, that the father willed the shares of the renouncers to accrete to the rest of the children; and every case of this kind is a

quæstio voluntatis. The case of Henderson, where a renouncer's share was found to accresce to the children not renouncing, contrary to the father's will, therefore is, and that alone, favourable to the claimant's plea.

The right of children to conquest is extremely similar to the legitim; and the idea, if a just one, of renunciation having the same effect as the death of the renouncer, should apply not less to conquest than to legitim. But in regard to the former, it has been repeatedly found, that a renouncer's share did not accresce to those who had not renounced, but became at the father's disposal; Allardice *contra* Smart, 1720; Threipland, Sinclair *contra* Sinclair, 1768; Dirleton, *voce* Executry.

The Lord Ordinary pronounced an interlocutor, in substance as follows.

“ Finds, that when a father takes a discharge and renunciation of
 “ the legitim from one of his children, no *jus. quæsitum* arises to the
 “ other children therefrom, the transaction being *res inter alios acta*
 “ as to them; so that the father has absolute power over such dis-
 “ charge and renunciation, and may cancel or burn it when he in-
 “ clines: Finds, that the same power must be competent to his
 “ heir or universal disponent, who has right to it from him; or, with-
 “ out destroying the deed, he may wave the exception which it af-
 “ fords him against the renouncer, and admit him to the legitim, to
 “ which the other children have not a title to object, but only to in-
 “ sist for collation, if that has not been discharged by the express or
 “ implied will of the father: Finds, that there is nothing in law or
 “ reason to disable the child from assigning, in the father's lifetime,
 “ his eventual right to the legitim, either to the father or to any o-
 “ ther person; and that if any other person claims upon such assign-
 “ nation, he must collate what the child has received in the father's
 “ lifetime; but that if the father's heir or disponent claims upon such
 “ assignation, he will not be obliged to collate, because the father can
 “ discharge the obligation to collate; and such discharge is implied
 “ from his having taken the assignation to himself: Finds, that a
 “ discharge and renunciation granted by a child ought to have the
 “ same effect as if an express assignation had been granted; the mean-
 “ ing of the parties being clear, and the omission of the assignation
 “ being probably owing to its being deemed unnecessary, and to the
 “ seeming impropriety of granting an assignation to a man who can
 “ never himself use it in his lifetime: Finds, that it has been twice
 “ adjudged by this Court, and by the House of Lords, that such dis-
 “ charge and renunciation as to conquest will operate in favour of
 “ the father and his heir, and not in favour of the child or children
 “ not renouncing: And tho' it is admitted in one of these two cases,
 “ that the contrary would hold as to the legitim, finds, that no so-
 “ lid reason is assigned for making the distinction: On these grounds,
 “ finds, that the renunciation of the other children cannot avail the
 “ pursuer,

“ pursuer, but must operate in favour of their father, who obtained
“ it, and his heir, the defender.”

Afterwards the Lord Ordinary took the cause to report on memorials, and the Court pronounced the following judgement.

“ Find, that the renunciations of the claim of legitim by the other
“ younger children of the deceased Mr Hog operated in favour of
“ the pursuer, Mrs Rebecca Hog, and has the same effect as the natural death of the renouncers would have had ; and as she is the
“ only younger child who did not renounce, find her intitled to the
“ whole legitim, being one half of the free personal estate belonging
“ to her father at the time of his decease.”

The defender reclaimed ; but the Court, on advising his petition, with answers, adhered to their interlocutor.

Reporter, *Lord Dreghorn.*

Alt. Dean of Faculty, *G. Fergusson, M. Ross.*

A&A. Lord Advocate, Solicitor-General, *Wight, J. Clerk.*

Clerk, *Sinclair.*

S.

N^o CLXXXVII.

June 29. 1791.

JAMES OGILVIE,

A G A I N S T

THOMAS WINGATE.

KING.—COMPETITION.—HYPOTHEC.—*A landlord, in virtue of the hypothec, how far preferable, in a competition with the officers of the revenue, suing for recovery of a debt due to the Crown.*

ON 11th July 1781, James Ogilvie, a collector of the excise, obtained a decree from the justices of the peace, against one Burgess, a tenant of Thomas Wingate's, for payment of certain distillery-duties. It contained the usual authority for pouding, roupung, and selling the goods belonging to the defender.

No

No farther steps, however, were taken at that time; and on 30th July following, the Sheriff of the county, at Mr Wingate's instance, awarded a sequestration of the effects of Burges's, as his tenant, for the rents secured by the hypothec.

A sale of the effects was afterwards ordered on 10th August; but before the sale, an officer of excise, acting under the authority of Mr Ogilvie, took a protest, wherein, after narrating the judgement which had been obtained on 11th July, he "arrested the effects under sale, " and prohibited Thomas Wingate, and all others, from intermeddling with them until the sums due to the Crown were paid."

In this manner a competition arose between Mr Ogilvie and Mr Wingate. In support of Mr Ogilvie's claim of preference, it was

Pleaded: At the Union of the kingdoms in 1707, though the municipal regulations of each country were preserved entire, it was intended that the laws relating to government and revenue should be the same in both.

For this purpose it was provided, that in both parts of the united kingdom, trade should receive the same encouragements, and be liable to the same prohibitions and restrictions; that the laws respecting the customs and excise should be the same; and that the Court of Exchequer, to be established in Scotland after the model of the English one, should proceed upon the same rules, and with the same authority and effect; 6th, 18th, and 19th articles of the Union, 6th Anne, c. 26.

It was farther provided, that the recognisances, and other securities taken by the Judges in the Scots Court of Exchequer, should have the full force of those taken in England, according to the true meaning of the statute of Henry VIII. and any other subsequent statute; that the Crown should enjoy the same preference in all suits and proceedings, according to the statute 33d Henry VIII. and by the usage of the Court of Exchequer in England; and "that the bodies, " as well as the lands and tenements, debts, credits, specialties, goods, " chattles, and personal estates, of all debtors, or accountants to the " Crown, or their debtors in Scotland, should be liable, by extent, inquisition, and seizures, or by any other process, ways, or means, to " the payment of said debts, duties, and revenues, to the Crown, in " such and the same manner and form as is used in the Court of Exchequer in England in similar cases;" 6th Anne, c. 26. § 6.

The only distinction which was allowed to remain between the laws of the two countries, in relation to the prerogative process of the Crown, is confined to the case of *real estates*, in Scotland; with regard to which the Scots law is declared to be still in force. And thus, in every question respecting *moveables*, or what in England is called *personal estate*, the rule established by the 33d of Henry VIII. and the subsequent enactments of the English parliament before the Union, must be equally binding on both sides of the Tweed; 6th Anne, c. 26.

§ 7.

By the statute of Henry VIII. § 4. it is provided, "That if any " suit be commenced or taken, or any process be hereafter awarded " for the King, for recovery of any of the King's debts, that the same " suit

“ fuit and procefs fhall be preferred before any other person or persons ; and that the King fhall have firft execution againft any defendants, of and for his faid effects, before any other persons, as always that the faid fuit be taken and commenced, or procefs awarded, at the fuit of the King, before judgement given for the faid person or persons.”

The application of thefe enactments is often attended with difficulty, from the ufe of the peculiar terms of the Englifh law. But in fuch cafes recourfe muft be had to analogy ; and the fame effect which in England is given to any particular right ought to be imparted to thofe in Scotland which have the neareft refemblance to it ; Kames’s Elucidations, p. 382.

In England, the preference to the Crown can only be excluded by a complete alienation, or a voluntary security followed with poffeffion. Hence a landlord in England, unlefs he has, by legal execution, appropriated the effects of his tenant for the rents due to him, is poffponed to the Crown. A landlord, therefore, in Scotland, ought to be in the fame fituation ; the exception as to real rights confirming in other inftances the general rule ; King *verfus* Cotton, Parker’s Reports, p. 112.

If we confider the origin and general nature of thofe remedies which the landlords of the two countries have for the recovery of their rents, the fimilarity is very remarkable. A diftreff, as in England the landlord’s remedy is termed, is held to be “ in the nature of a pledge by the operation of the law,” being derived from the Roman jurisprudence ; Bacon’s Abridgement, *voc.* Diftreffs. The Scots landlord’s right of preference is traced to the fame fource, and for fome time feems to have gone under the fame name, until after the institution of the College of Juftice, when the modern term of *hypothec* was given to it ; Stair, book 4. tit. 25. § 15. ; Stat. 7. Rob. I. ; Blackftone, vol. 3. p. 14. l. 9. D. *De pignorat. act.* ; Bankton, vol. 1. p. 383. 398.

It is true, that fome of our lawyers have confidered the landlord’s intereft in the effects of his tenant as a right of property arifing from the rule, *Quod folo fatum folo cedit*. But that this rule fails here in its application, is evident in the cafe of cattle and other flocking brought upon the lands, and in that of the *invefta et illata*, in the leafe of fubjects unconnected with a farm. The circumftance, too, of its being incompetent for a Scots landlord to recover the immediate produce of the farm, after the elapfing of three months from the term of payment, and the cattle and other flocking, after they have been *bona fide* delivered to a purchafer, is quite incompatible with every idea of that fort.

Indeed the remedies given to the Englifh landlord appear to be much more efficacious than thofe which our law affords : He may retain the effects of his tenant until the whole arrears are difcharged ; while in Scotland, with the exception of the corn, which, as long as it remains on the lands, is hypothecated for the rents of that year of which it is the produce, the landlord’s right of retention is limited to the rent of one year. An Englifh landlord, without any judicial au-

thority, has the power of selling his tenant's effects, a liberty which our law does not permit; 8th Anne, c. 14.; Geo. II. c. 19.

Answered: The present case falls within the meaning of the exception in the statute 6th Anne, with regard to *real estates*. In vain would a creditor in Scotland obtain a security over the lands of his debtor, if at any time the officers of the Crown might exclude him, or, what is the same thing, the hypothecary privilege of his debtor, by which alone he is enabled to appropriate the produce of the lands for his payment.

2. Although by the Union the government of both kingdoms became the same, the peculiar laws and usages of each were in general preserved entire. Any law, therefore, applicable to both countries, though intitled to the same force in each of them, must be applied according to their respective municipal institutions; and where any part of the law of the one has been imposed on the other, it must operate agreeably to the constitution of the kingdom where it is to have effect, and must take the different objects of law, as there established and defined, without changing their nature.

If the rights of the landlords in both countries were the same, though known by different names, it would no doubt follow, that if the landlords in England were excluded by the prerogative process of the Crown, as defined by the statute of 33d Henry VIII. the landlords of Scotland, in consequence of the extension of that law at the Union, should in like manner be excluded. It might even be admitted, that though these rights were not entirely the same, yet if the resemblance between them was nearer than between the right of the Scots landlords, and those of a similar nature which are in England disregarded in a competition with the Crown, the conclusion would be the same. But neither of these propositions can with any justice be maintained.

The privileges of the Scots landlord are derived from the common law, which holds, that the produce of the ground, and by analogy the cattle and other stocking upon it, are his property, or at least that he has such a real right or *lien* in them as precludes the tenant from selling them till the rent is paid. And the limitations of this general rule are to be found in peculiar enactments, or in the subsequent usage, which, by following out the views of the legislature, have reconciled this privilege to the interests of commerce, and a more improved state of society; *Reg. Maj. lib. 4. c. 22.*; *Stat. Dav. II. c. 5. 7.*; Act 1469, c. 36.; Sir George Mackenzie's Observations; Durie, 11th July 1628, Ednam *contra* the Laird; July 1726, Richardson; Kames, Law-Tracts, 4. Elucidations, article 10. p. 70.; *Instit. lib. 2. tit. 2. § 32.* Stair, b. 1. tit. 13. § 15. b. 4. tit. 25.; Bankt. b. 1. tit. 17.; Erskine, b. 2. tit. 6. § 56. 57.

In England again, the common law afforded to a landlord only a right of distress, or of *impounding* his tenant's effects, while they remained on the farm, without preventing a voluntary sale by the tenant, or the prior diligence of his other creditors. So stood the law of England in the reign of Henry VIII. and so it continued to stand at
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the date of the Union, so that the preference of the Crown in a question with the landlord could not admit of any doubt. By the later statutes, which however cannot affect the present question, although from their giving a power of recovery and of sale, the remedy by distress is rendered more efficacious than formerly, the nature of it still remains the same; the landlord having no real lien in the effects, but merely a right of action founded on these statutes; 2. Ventris, p. 268.; Park, 122.; Jacob, *voc.* Distress; Blackstone, b. 3. c. 1. § 1. vol. 3. p. 6.; Parker's Reports, p. 121.

The situation of a Scots landlord, more resembles that of the furnisher of repairs to a ship in a foreign port, to whom, by the act of the law, the ship is held to be impledged. In such a case, the prerogative of the Crown ceases, as indeed it seems to do in every case, where the competitor, before the commencement of the suit, has acquired a real interest, or, as it is called, a special property, in the effects. In a competition with—a factor,—a manufacturer,—or a carrier, whose interest in the goods intrusted to their care is not more ample than that of a Scots landlord in the effects of his tenant, the Crown has no preference. In the same manner, it might also be observed, the assignees under an English commission of bankruptcy exclude the right of distress as well as the prerogative process of the Crown; but in Scotland, a landlord excludes the factor named under the Scots bankrupt statutes; Parker's Reports, p. 119. 10th August 1781, Buchan *contra* Nisbet.

After giving one judgement in favour of the landlord, the Lord Ordinary took the case to report on informations.

The informations were followed by a hearing. Cases were also made up, and the opinions of eminent English counsel obtained, which however were not satisfactory.

Some of the Judges seemed to think, that the landlord's claim was strongly founded in the exception with regard to real estates. The judgement of the Court, however, which was nearly unanimous, did not seem to rest there, but on the nature of the Scots hypothec compared to the right of distress in England; all the Judges being of opinion, agreeably to the sentiments expressed by Lord Hardwick, in the case of Gordon against Park, referred to in Lord Kames's *Elucidations*, *loc. sup. cit.* that in the construction of such a law as that of 6th Anne, which transfers an English statute to Scotland, without applying the principle of it to the terms known in the Scots law, regard was to be had to analogy, so as to give the same effect in both countries, to those rights which are either the same, or have a very close resemblance.

Such of the Judges as disapproved of the judgement, were of opinion, that the difference between the situation of the landlords in the two kingdoms, was not so great as to justify the giving of so important a preference to the Scots landlord.

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The interlocutor was in these terms,

The Lords find, "that the landlord's right of hypothec over the
"crop and stocking of his tenant, cannot be defeated by the prero-
"gative process of the Crown, in virtue of the statute of the 33d
"year of the reign of Henry VIII. as extended to Scotland, by the
"articles of Union, and the act of parliament the 6th of Queen
"Anne."

After advising a reclaiming petition, which was followed with an-
swers,

The Lords adhered to the judgement above recited.

Reporter, *Lord Henderland.* A&C. King's Counsel, *Abercromby.* Alt. Dean of Faculty.
Wight, Cathcart. Clerk, *Mitchelson.*

C.

N° CLXXXVIII.

DECISIONS

OF THE

COURT OF SESSION.

Nº CLXXXVIII.

November 15. 1791.

YORK-BUILDINGS COMPANY,

A G A I N S T

MARTIN, STONE, and FOOTE.

PERSONAL OBJECTION.—*Bonds having been issued in a form calculated for ready currency, and apparently free from exception; the exceptio non numeratæ pecuniæ, though good against those who first obtained them, not competent against their assignees.*

THE York-buildings Company, about sixty years ago, as a resource for procuring money, issued bonds to a large amount, for sums far exceeding the value obtained for them. They were in the following form, being transferable by indorsement, and similar to those of the East-India Company:

“ The Governor and Company of Undertakers for raising Thames
“ water in York Buildings, do hereby oblige themselves and their
“ successors, to pay unto his execu-
“ tors, administrators, or assigns, by indorsement hereon, One hun-
5 G “ dred

“dred pounds, with interest at the rate of *per centum per annum*, on the *day of* ; for the true payment whereof, they bind themselves and their successors in the penal sum of Two hundred Pounds. *London, the day of*
 “By order of the Court of Assistants.”

Each bond was signed by the Company's cashier, sealed with the Company's seal, and made payable to one of their officers, who put his name on the back of it; in which state it was delivered to the original creditor, having, in a few instances, the indorsement filled up, but in general it was left blank, as it still remains.

In the ranking of the creditors of the Company, claims were made on those bonds, which had passed through a variety of hands. To these claims it was, on the part of the Company,

Objected, That the *exceptio non numeratæ pecuniæ*, which would have stood against the cedents, was equally competent against the assignees.

Answered: The form and manner in which the Company issued their bonds, as circulating securities transferable without embarrassment, evinced their intention to obtain the advantage of rendering them marketable in Exchange Alley, like India bonds or Government stock; and having thus gained their end, they are barred *personali exceptione* from disputing that privilege, on the faith of which the acquisition of the bonds was made.

If, then, the Company would otherwise have had the right of opposing to an assignee any exceptions applicable to the cedent, they must be presumed to have renounced that right. For every man may renounce a legal interest or privilege, if no injury result to third parties. Thus, formerly, in the case of blank bonds, the granter was understood to have renounced all pleas of compensation prior to the date, though, at the same time, the right of his other creditors remained entire.

In some instances, the negotiability of obligations, it is true, has been authorized by particular statutes. But this was not necessary; for it might have been equally established by usage; as has happened in respect of India bonds, which have thence acquired the same currency. Nor should the bonds in question be thought to have received a less sanction from the public acquiescence during so long a period of time.

Replied: The general rule of law is, that every plea which would have effect against a cedent, shall be equally effectual against the assignee.

If the bonds or obligations granted by the South-Sea Company be assignable by indorsement, and negotiable like bills of exchange, or if those of the Bank of England be in a similar situation, it is, because that privilege was conferred on those companies by special acts of parliament; 5th William and Mary, cap. 20. § 29. ; 9th Annæ, cap. 21. § 27. But the York-buildings Company never obtained any such privilege.

Nor,

Nor, from the manner in which the bonds are framed, does any personal exception arise to bar the present plea. The indorsement is a short form of assignation; but its brevity will not exempt the assignees from the usual obligations. Indeed the managers of the company had no power to issue bonds in any such irregular or illegal mode, as to create a damage to the company, or to make that a just debt, which in reality was not just.

The objection, of no true value being given for the bonds, is of a different nature from the plea of compensation, held to be renounced in the case of blank bonds. Nay, it is such as could not have been relinquished even by the company in a body; nor, in the case of a single person, could it be renounced by the individual himself. For if a bond be granted for more than the money truly advanced, the transaction becomes usurious. In this view, indeed, the point of negotiability is, in a great measure, superseded, as that objection would be competent even against a bill of exchange, if used out of the ordinary course of commerce; Bankton, b. 1. tit. 13. § 17.

The Lords “ found, that the York-buildings Company, having,
“ in the year 1731, and at other periods, issued bonds payable to a
“ clerk of the Company, or his assigns, by indorsement, any holder
“ of the said bonds, whose name was afterwards filled up in the blank
“ indorsation, as the assignee of the said nominal obligee, for value
“ received, must be presumed to have acquired such bond fairly,
“ and must be held as a just and lawful creditor for the full con-
“ tents thereof; and that the Company are not intitled to plead
“ any defence against his demand, arising either from the form of
“ the security, or from latent objections against other persons who
“ may formerly have been possessed of the said bond, but whose
“ names do not appear on the face of the bond or indorsation.”

For the York-buildings Company, *M. Ross, et alii.*
Colquhoun.

Alt. Maconochie, et alii.

Clerk,

S.

N° CLXXXIX.

November 15. 1791.

GEORGE HALDANE, and others,

A G A I N S T

CHARLETON PALMER.

RANKING AND SALE.—*A decree of sale, at the suit of an apparent heir, is only held as an adjudication for the creditors of the ancestor, where it is within year and day of the first effectual adjudication.*

IN the month of September 1775, a decree of adjudication was obtained by Charleton Palmer against the lands of Grange. And it afterwards became the first effectual one, by a charge against the superior of the lands.

Before this, however, and in the month of June 1775, a summons of sale was instituted by the apparent heir of the debtor; though the lands were not sold for many years after. In the mean while, several adjudications were led, and among others, one at the suit of Mr Haldane, in the year 1778.

In the ranking of the creditors, it was contended by Mr Haldane, and those creditors whose adjudications were not within year and day of the first effectual one, that the summons of sale, at the instance of the apparent heir, was to be considered as an adjudication for the whole creditors, and consequently that the whole were to be ranked *pari passu*. In support of this argument, Mr Haldane

Pleaded: The law considers an apparent heir bringing his ancestor's estate to a sale, as a trustee for the creditors of the ancestor. On this principle it was found, with regard to the lands in question now sold*, that the summons of sale, by the apparent heir, barred a similar action at the suit of the creditors. For the same reason, it should seem, that, pending the sale, the creditors were not obliged to use any diligence for attaching the lands; as was found, 29th January 1748, Irvings.

In that case, indeed, the decree of sale was within year and day of the first effectual adjudication. But it would be unreasonable, if the interest of the creditors were to depend on an event not in their power, and so entirely arbitrary. As in a voluntary trust, no creditor, by separate measures, can secure a preference over the rest; so in those established by statute the same rule must hold, otherwise the regula-

* 5th March 1776, not yet collected.

tion, instead of being beneficial to creditors, would prove a snare to those who relied on it.

Indeed, after a summons of sale, the matter becoming litigious, no step can be taken by one creditor to the exclusion of the rest; Erskine, b. 2. tit. 12. § 65.

Answered: Prior to the enactment of 1661, the creditor who obtained the first decree of adjudication, was entitled to an exclusive preference; and although the general rule was then departed from in favour of those creditors who led adjudications within year and day of the first effectual one, it remained, in other respects, unaltered.

Before the commencement of the summons of sale, therefore, the first effectual adjudger in this case had a *jus quæsitum*, which could not be taken away. Actions of sale indeed instituted by apparent heirs, as being attended with less expence, are preferred to those at the suit of creditors, but there is nothing to prevent an attachment of the lands within year and day of the first effectual adjudication in the same manner as before; and consequently, if any of the creditors omitted to do this, they have no right to complain; Bankton, vol. 2. p. 240.

In cases, it is true, where the decree of sale has taken place within year and day of the first effectual adjudication, it seems to have been justly determined that the creditors should be admitted to a rateable distribution; otherwise, from the act of the heir, much injustice might ensue. But the principle of that decision is not applicable to the present case. The supposition, too, of any parallel between voluntary and legal trusts, is equally erroneous.

Were an action of sale by an apparent heir supposed to be equivalent to an action of adjudication for the creditors at large, it must still be observed, that it is not the date of the summons in either case, but that of the decree, which regulates the preference. Besides, the cases are in no respect similar. An apparent heir bringing his ancestor's estate to sale, is so far held to be a trustee for the creditors, that every thing he does equally redounds to their advantage as to his own. But although, in this manner, the creditors reap the benefit of what the heir does, it does not follow that the heir, for their benefit, should be held to have done what he has omitted to do.

As to the maxim *pendente lite*, the effect of it is to prevent the granting of voluntary rights, and not to tie up the hands of competing creditors; Fac. Coll. 12th July 1785, *Maffie contra Smith*.

This question being reported on informations,

The Lords unanimously found, That, in the circumstances of this case, the creditors were preferable according to the diligences used by them respectively.

Lord Reporter, *Hailes*.

For Palmer, *W. Craig*.

Alt. *Abercromby*.

Sinclair, Clerk.

N^o CXC.

November 17. 1791.

The MINISTER, HERITORS, and KIRK-SESSION of DALRY,

A G A I N S T

JOHN NEWAL, and others.

SOCIETY.—*The heritors and kirk-session of a parish, in respect to a charitable fund under their administration, intitled to sue and defend as a corporate body.*

ABOUT the middle of the last century, a large sum of money was bequeathed for the purpose of erecting a free grammar-school in the parish of Dalry. There was a nomination of trustees for managing the fund; but as none of them had ever acted, the administration was assumed by the heritors and kirk-session.

Mr Newal having borrowed a part of the money, for which he granted his bond to them, they obtained a decree of constitution, and deduced an adjudication against his estate.

It was afterwards objected to the validity of the adjudication, that these processes were incompetent, having been carried on at the instance of the heritors and kirk-session as a public body, whereas, not being incorporated, they ought to have sued individually. But

The opinion of the Court being, that, from the nature of the case, the heritors and kirk-session were necessarily to be considered as a body corporate,

The Lords repelled the objection.

Reporter, Lord Dregburn.
Menzies.

Ast. W. Robertson.

Alt. D. Cathcart.

Clerk,
S.

N^o CXCI.

N^o CXCI.

November 29. 1791.

ANNE ELISABETH JANKOUSKA, *alias* GRIEVE,

A G A I N S T

ANDREW ANDERSON, and others.

TERCE. — APPROBATE AND REPROBATE. — Act 1681, c. 10. — *The operation of this enactment excluded by any deed which shews an intention of not with-holding the Terce.*

M^{RS} JANKOUSKA, a native of Russia, was married to Tamez Grieve, who was possessed of considerable funds both in Russia and in England, and was also proprietor of a small landed estate in Scotland.

Mr Grieve executed a settlement in the English form, giving to his wife, in case of her surviving him, an annuity of L. 800 out of his Russian property, a house at Petersham near London, and a sum of L. 2000, secured by mortgage in England. He also directed his Scots estate to be sold, and the price to be liferented by Mrs Grieve. But owing to the form of the deed, this last part of it became ineffectual.

Mrs Jankouska, therefore, claimed a terce out of her husband's lands in Scotland; but in this she was opposed by Anderson, and other heirs of her husband, who

Pleaded: To prevent exorbitant settlements in favour of wives, it was provided by the statute of 1681, "That in all time coming, "where there shall be a particular provision granted by a husband in "favour of his wife, either in a contract of marriage, or some other "writ before or after the marriage, the wife shall be thereby excluded from a terce out of any lands or annualrents belonging to her "husband, *unless it be expressly provided* in the contract of marriage, "or other writ containing the said provisions, that the wife shall "have right to a terce by and attour the particular provisions conceived in her favour."

The present claim is in direct opposition to this enactment. If, indeed, the pursuer had rejected the settlements executed by her husband, she might doubtless have claimed her legal provisions. But it would be now too late for her, were it consistent with her interest, to repudiate those settlements. The intention of her husband respecting the disposal of the Scots estate cannot be of any importance. Although, in the event of selling the lands, it was meant that

that she should enjoy the liferent of the price, it does not appear, that while the lands were unfold, she could claim any part of the rents: And besides, the settlement being, as to them, ineffectual and void, the case is to be viewed in the same light as if it had never been intended; Mackenzie's Observations on act 1681.

Answered: The enactment of 1681 imposes no restraints on husbands when executing deeds in favour of their wives. It was wholly meant to prevent wives from demanding their legal as well as their conventional provisions, which they were formerly authorised to do, if not excluded by particular stipulations. And therefore, wherever it appears to have been the intention of the husband that his wife should enjoy both, the statute ought to be laid aside as inapplicable.

This is evident from the preamble of the statute, which sets forth, "That sometimes, through the ignorance and inadvertence of writers and notars, clauses are insert in contracts of marriage containing provisions by husbands in favour of their wives, without mentioning the terce that is due to them by law, or expressing the provisions to be granted in satisfaction of the terce, whereby occasion is given to relicts to claim a terce out of their husbands estate by and attour the provision conceived in their favours, *contrary to the meaning of the parties-contractors.*" In the present case, it was intended, that the widow, during her life, should enjoy what the produce of the Scots estate, when converted into money, should yield, although considerably exceeding the rents of the land. Nor could the husband's will to admit his wife's claim of terce be more forcibly expressed, than by a deed giving to her a liferent of the whole. His heirs, therefore, must either ratify this settlement, or they must put it entirely out of view; and in either case the determination will be favourable to the widow.

The Lord Ordinary rejected the widow's claim of terce. And to this judgement the Court, on advising a reclaiming petition, with answers, adhered.

But after advising a second reclaiming petition and answers,

The Lords found, That the Lady was intitled to a terce.

Lord Ordinary, *Hailes.*

A^ct. *Honyman.*

Alt. *Abercromby.*

Clerk, *Menzies.*

C.

N^o CXCI.

November 30. 1791.

JANE DURIE,
 AGAINST
 ALEXANDER COUTTS.

HERITABLE AND MOVEABLE.—*An estate, partly heritage, and partly moveables, being conveyed to trustees for behoof of heirs, legatees, and creditors, with power to sell the subjects and convert them into money; the interest of the heirs held to be an heritable right, and not a jus crediti disposable by testament.*

FOREIGN.—*Succession in moveables regulated by the lex domicilii.*

THOMAS DURIE, whose residence was in the Isle of Man, having occasionally come to Scotland, executed there a trust-deed of settlement in the Scottish form.

In the narrative it is set forth to be his intention, “ That his whole property should be vested in certain trustees; that his houses, &c. should be sold, if they thought fit; and that the *produce* of his heritable and personal estate should be applied in manner after mentioned.”

It then makes over to the “ trustees, for the use and behoof, in the *first* place, of the heirs of his body, whom failing, of David Durie, whom failing, of Jane Durie and Margaret Durie, equally, and to the longest liver of them, all and sundry heritable subjects that should happen to pertain to him at the time of his death; and particularly, an heritable debt of L. 2000 affecting certain lands in Scotland; together with all and sundry debts and sums of money, as well heritable as moveable,” &c.

And “ full power is granted to the trustees to intromit with, transact, uplift, and discharge the sums and others above disposed.”

The conveyance was burdened, beside the granter’s debts, with the payment of various annuities and other legacies.

The succession having devolved to Jane and Margaret Durie, they, being sisters, mutually executed settlements according to the forms of the Isle of Man, where they lived, in favour of each other, and of Jane Durie their mother.

Margaret died several years before her sister Jane, who, immediately before her death, by a nuncupative will, bequeathed her whole effects, real and personal, to her mother. At this time the heritable debt had not been paid to the trustees, as it very soon after was.

Upon the death of Jane a competition for the succession, chiefly in respect to that debt, took place, between her mother, on the one hand, who, by the law of England, was intitled to it, both under her testaments and as legal heir; and, on the other, Mr Coutts, the heir by the law of Scotland: the issue of which depended on this point, Whether the right of Jane, under Mr Durie's settlement, was heritable or moveable. For Jane Durie, the mother, it was

Pleaded: "The distinction of heritable and moveable," says Lord Stair, "is derived to rights and obligations, as the matter thereof is heritable or moveable;" b. 2. tit. 1. § 3.

Now, the right which accrued to Jane Durie from the settlement in question, had not for its subject or *matter* either the whole or a part of any specific effects, whether heritable or moveable, but the residue of their value which should exist after the management of the trustees had ceased. This is apparent from the terms of the deed, which declared, that it was the *produce* of the whole estate, disposed of at their discretion, by sale or transaction; and not the estate itself, or any portion of it, which was to be applied for the purposes of the trust.

For this *produce* they were to be accountable to those interested; but over the specific subjects they had in all other respects an absolute power. They might convert the whole of that property into money, or this into other property. They might change heritable subjects into moveable, or moveable into heritable. In short, they were restrained by no obligation but that of restoring the value, and therefore were plainly debtors to that amount, the favoured persons being the creditors. Of these last Jane Durie was the chief, having a *jus crediti* in this respect, and nothing else; a moveable subject disposable by testament, and falling to next of kin.

This view of the case is illustrated by the inconsistent consequences which would follow an opposite supposition, or that of any *pro indiviso* right in the specific portions of the testator's property.

First, The right of the legatees being evidently of the same description as that of the heir, they must, as far as it was deemed heritable, have made up titles by service, however anomalous the proceeding might be. Their representatives too, in the same way, must have been obliged to employ both service and confirmation; and this remark applies also to the creditors.

Secondly, If the right of those interested referred to the particular nature of the subjects that composed the estate, then, in consequence of the extensive powers of the trustees, a person's interest might have been rendered heritable one day, the next day moveable, and the third heritable again; and yet all this perhaps, both very proper management, and done without even his knowledge, much less any power of controul on his part.

Thirdly, Had the heritable debt been paid to the trustees but a day before Jane died, instead of a day or two after, the competitor could not have pretended any claim as heir; and were it not strange, that the right of her succession should depend upon such a casualty as that?

It

It was then a mere *jus crediti*, or claim of accounting, against the trustees, which resulted to all the persons indiscriminately who were interested in the deed. This conclusion is not a novelty in the practice of the Court; a point essentially the same having been so determined, 25th February 1780, Grierfon *contra* Ramsay; Fac. Coll.

In that case, a debtor having conveyed his heritable estate to a trustee for behoof of his creditors, a creditor of one of *them* used arrestment in the trustee's hands; and it was found, that this was the habile diligence, and not adjudication; because the right of the creditors, by the trust-deed, resolved into a mere *jus crediti*; or, in other words, was accounted of a moveable nature. For such subjects only can be attached by arrestment; and it required the statute of 1661 to make that diligence effectual in respect to heritable bonds.

Answered: Had the heritable debt in question been directly conveyed to Jane Durie by the testator, it could not be disputed, that her right ought to be esteemed heritable. Now it surely cannot make any difference in this respect, whether a subject be held by the party interested, in his own name, or by a trustee for his behoof.

It is true, this debt was not vested in Jane Durie's person by a complete feudal title, and so far it may be said that her right resolved into a personal claim against the trustees, which was that of denuding in her favour. But the subject of her right really was an heritable debt secured by infeftment on a land-estate in Scotland, which, as much as any thing could be, was, *sua natura*, an heritable subject.

Even a personal right to an heritable subject is heritable. In the case, for example, of a disposition without infeftment, or of a minute of sale, the right certainly is personal; yet it is not therefore moveable, or descendible to executors. In short, every right affecting land is properly heritable, whatever may be its nature, or whether it be completed in the feudal form or not.

In confirmation of this, an appeal may be made to the case of Douglas, Heron, and Company. Upon their issuing transferable bonds, certain heritable securities were vested in trustees for behoof of the creditors in the bonds. But it being understood, that the effect of this circumstance was to render the bonds an heritable subject, and so not disposable by testament, a clause was inserted in the act of parliament obtained on that occasion, declaring, that they should be deemed *personal* estate, so as to descend to executors, and be disposable by testament.

On the same principle, if a person's agent has, by his direction, lent out a sum of money for his behoof on the security of a land-estate, it becomes an heritable subject, and to be governed by the rules of law respecting heritage. And it is to be observed, that at the time of Jane Durie's death, the only period to be considered in this argument, the debt in question was heritable, though it was soon afterwards uplifted by the trustees.

The decision in the case of Grierfon would indeed have been applicable at present, had it related to a competition between the truster's heir and executor, and if the subjects of the trust had been found to descend

descend to the latter ; whereas it respected only the claims of creditors, who, instead of having, like Jane Durie, a special title to those effects, had no farther interest than to obtain payment of their debts. Besides, from a subject's being arrestable, it does not follow, that it is likewise moveable and disposable by testament. Witness heritable bonds prior to feisin, and bonds including executors.

There was another question agitated at the same time, viz. Whether or not the disposal of the effects considered as moveable should be regulated by the law of England, being that of the domicile. But any elaborate discussion of it was superseded by the recent case of *Hog contra Hog* *.

The Lord Ordinary pronounced judgement as follows : “ Having considered the memorials, &c. and the decision therein referred to ; “ as also the late determination of the Court, in the question between “ Mr Hogg of Newliston and his sister, finds, that in virtue of the “ trust-disposition by Thomas Durie, the persons for whose behoof “ that disposition was granted, had not a *pro indiviso* share in the subjects conveyed to the trustees, but only a personal claim or ground “ of action against them to account : Finds also, that the moveable “ succession of Thomas Durie must be regulated by the law of the “ Isle of Man, not that of Scotland.”

This interlocutor being brought under review, in a petition to the Court, with answers, a considerable part of the Judges adopted the argument for Mrs Durie, though that of the opposite party prevailed in the opinion of the majority.

“ The Lords altered the first part of the interlocutor of the Lord “ Ordinary, and preferred Mr Coutts to the sums *in medio* due by the “ heritable security ; but adhered to the last part of the Lord Ordinary's interlocutor, and found, that the moveable succession of “ Margaret Durie and Jane Durie fell to be regulated by the law of “ the Isle of Man, where they had their domicile at the time of their “ respective deaths.”

A petition reclaiming against the former part of this judgement was refused, without answers.

Lord Ordinary, *Dreghorn*.
General. Clerk, *Home*.

For Mrs Durie, *Rolland, M. Refs.*

Alt. Solicitor-

S.

* Page 376. *sup.*

N^o CXCIIL.

December 8. 1791.

ANDREW HUTCHISON,

A G A I N S T

The CREDITORS of JAMES GIBSON.

BANKRUPT.—*A disposition omnium bonorum by a person insolvent, but not under the description of act 1696, to a trustee for behoof of his creditors, named by a majority of themselves, valid.*

GIBSON, who had become insolvent, but was not bankrupt according to the terms of the statute of 1696, offered to make over his funds to his creditors in a body. This offer they having accepted at a regular meeting, he granted to two of their number, named by them as trustees for the whole, a disposition of all his effects, which were chiefly household-furniture, and in value much inferior to the amount of the debts.

The trustees received the possession of the goods, and had just completed a sale of them by public auction, when Hutchison, a creditor who dissented from the rest, used arrestment in the hands of the purchasers at the roup, and of the auctioneer. In a competition which afterwards took place between him and the trustees, he disputed the validity of this trust-deed, as being a disposition *omnium bonorum* by an insolvent debtor. In support of the objection, it was

Pleaded: No man is intitled to usurp a power over another's rights. Hence, whenever a man knows himself to be irretrievably insolvent, it becomes unlawful for him to exercise a single act of property, by which the situation of any one of his creditors may be altered in the least; because, by so doing, he necessarily infringes rights with which he ought not to interfere. Among these, one is the right of any creditor to obtain a preference, by a vigilant use of the legal means; and therefore a debtor in such a situation cannot lawfully, by a disposition *omnium bonorum*, or any other act, deprive the creditor of this advantage; which, it may be remarked, is signified by the appropriate expression, *vigilantibus jura subveniunt*.

This principle is evinced by the statute of 1696, which defines the circumstances of that insolvency, which justice must ever render a bar to the disposal of property. But it does not itself create that bar; otherwise it would enact that which is positively unjust.

Nor can the concurrence of any majority of creditors give validity to an act of the insolvent debtor, tending to alter the relative situation of any individual without his consent; for creditors are regarded as independent of each other, and not as a collective body or society.

It follows then, from the general principles of law, that the disposition in question was *ultra vires* of the granter, and consequently null and void.

In the case of Snee and Company *contra* Trustees of Anderson, 12th July 1734, the Court found, "that no disposition by a bankrupt debtor could disable creditors from doing diligence," Dict. *voce* Bankrupt. The terms *bankrupt debtor* seem here to be synonymous with those of *insolvent debtor*, though the debtor was likewise bankrupt according to the statute of 1696.

Similar judgements were pronounced in the cases of Mansfield *contra* Brown and Stobo, 28th January 1735; of Earl of Aberdeen *contra* Creditors of Blair, 3d February 1736; of Forbes-Leith *contra* Livingstone, 25th July 1759, Fac. Coll.; of Moodie *contra* Dickson, 14th November 1764; of Peters *contra* Dunlop's Trustee, 27th January 1767; of Johnston *contra* Fairholm's Trustees in 1770; of Scott *contra* Trustee of Hogg and Son in 1770; of Fraser *contra* Monro, 5th July 1774; of Walpole and Ellison *contra* Alexander's Trustee, in 1778; and in various later instances.

A distinction has been sometimes supposed, as to the effect of trust-deeds, between those bankrupts who had fallen under the statutory description and those who had not. But it is plainly ill-founded, for the statute being directed against "fraudful alienations" creating preferences, cannot refer to a general trust for behoof of creditors, which is not a fraudulent alienation.

Answered: By that argument it is plain, all bankrupt laws must be accounted unjust. But the reasoning is fallacious.

If the law will not permit one person to usurp the rights of another, it is because it holds sacred those of every man. The right of property being one of the most sacred, is even protected in an use that is immoral and unjustifiable; since an insolvent debtor, when not precluded by diligence under the statute of 1621, or placed within the description of that of 1696, is intitled in law to convey his effects for the payment of any particular creditor, to the prejudice of the rest, though equally onerous; Dict. vol. 1. p. 66.; Erskine, b. 4. tit. 1. § 41.

Thus it appears how very far mere insolvency is, from inferring any forfeiture of the right of property. For it would be extraordinary indeed, were the law to sanction it in its unjust exercise alone, withholding all countenance from that equitable and rateable distribution which is so obviously the demand of justice. No such doctrine, it is certain, can be learned from any of the decisions of the Court; with regard to which, however, two distinctions are to be received.

In the *first* place, From the way in which the statute of 1696 is expressed,

pressed, its terms in their literal import seem to comprehend every deed of the debtor, by which even the power of obtaining by the diligence of the law a partial preference, is precluded; and thus affords to creditors an obvious plea, however ungracious, against the most equitable conveyances by the bankrupt debtor. The phrase "vigilantibus," &c. is really not so much an expression of approbation, as a sort of notice of a degree of evil that is unavoidable, for the sake of a more extensive benefit.

In the *second* place, When trust-rights are granted for behoof of creditors, it is to be considered, whether it be to the trustee of the creditors, or of the debtor; for it is only in the former case that the debtor can be divested of the property, and while it remains with him, it must necessarily be subject to the diligence of any of his creditors.

Now in all cases, without any exception, where the granter had not fallen under the precise statutory description of bankruptcy, so as to authorise a challenge on that ground, and where the grantee was not the trustee of the debtor himself, general conveyances for the behoof of creditors have been uniformly sustained.

Thus: Kilkerran, *voce* Bankrupt, 13th November 1744, Snodgrass *contra* Creditors of Beat; 5th June 1747, Grant *contra* Cunningham. Fac. Coll. 23d January 1756, Souper *contra* Creditors of Smith. Select. Decis. 30th July 1766, Mackell *contra* Trustees of Maclurg. Ibid. 24th February 1769, Watson *contra* Orr; 15th June 1773, Ramsay *contra* Creditors of Ramsay.

Even where the challenge has been laid on the statute, such dispositions have been often supported; for example, Dict. *voc.* Bankrupt, 3d July 1724, Creditors of Watson; Fac. Coll. 16th November 1757, Sim *contra* Sim; 18th February 1762, Baillie *contra* Macvicar; Fac. Coll.

Of the cases quoted on the other side, there is not one which did not relate to bankruptcies, according to the terms of that statute, excepting that of Walpole and Ellison alone; in which not only was the trust-deed granted to the private mandatary of the party, but it was besides of an actually fraudulent nature. As to the case of Snee, it seems incongruous to admit, that it related to the statutory bankruptcy, and yet, without any authority, to deny the influence of this circumstance.

Two other topics were introduced by the trustees: 1. That at any rate they were intitled to retention of the proceeds of the roup; and 2. That the arrester, after availing himself by his diligence of proceedings founded on the conveyance, was *personali exceptione* barred from objecting to it.

The question at first came before the Court in a reclaiming petition and answers. But considering the point to be of importance as a precedent, their Lordships ordered memorials, for the purpose of presenting a full view of former decisions.

On advising these, some of the Judges paid attention to the considerations last mentioned. But the Court were unanimously of opinion, that the conveyance in question was valid and effectual; and therefore

The

The Lords dismissed the claim of the arresting creditor, and found him liable in expences.

Lord Ordinary, *Halles.*
Clerk, *Colquhoun.*

For Hutchison, *Maconochie, Wauchope.*

Alt. *Stewart.*

S.

N^o CXCIV.

December 9. 1791.

JAMES DUNLOP, and others,

AGAINST

THOMAS MUIR, and others.

JURISDICTION.—*Questions respecting the right of electors of ministers under act 1690, competent in the civil courts.*

THE parish of Calder, in the presbytery of Glasgow, is one of those that obtained, under the authority of the statute of 1690, cap. 23. the right of nominating their ministers; which, in the first instance, is vested in the heritors and elders.

A vacancy having happened, those of Calder split into two parties, each contending that it composed a legal majority of electors.

An action of declarator having been instituted by one of the parties against the other, for ascertaining their legal qualifications; it was

Objected: That such action was incompetent before a civil court. For the statute ordains, that upon the heritors and elders naming and proposing to the congregation a person as their minister, “to be approved or disapproved by them; if they disapprove, the disapprovers shall give in their reasons, to the effect the affair may be cognosed upon by the presbytery of the bounds, at whose judgement, and by whose determination, the calling and entry of a particular minister is to be ordered and concluded.” And thus it appears, that every point in dispute among the collective body of heritors and elders, is subjected to the exclusive determination of the church-courts.

Answered: The objection has arisen from inattention to the distinction between matters of a spiritual nature, which belong to the ecclesiastical judicatories, and those which, being patrimonial, fall under the jurisdiction of civil courts. Among these last, rights of patronage

age have always been reckoned, as comprehending the disposal of the benefice or stipend. The church-courts indeed may have the exclusive cognisance of the pastoral or spiritual relation, but the temporal benefice is placed under the controul of the civil power; insomuch, that in the case of the parish of Lanerk, a person, though invested with the ministerial office, was, by this Court, denied the enjoyment of the stipend.

Nor is the case of a single patron different from that in which, by the statute in question, the power of nomination is conferred on a plurality; for the circumstance of a right being vested in an individual, or in a collective body, does not vary its nature; Fac. Coll. 16th June 1772, Logan *contra* Snodgrafs.

The Lord Ordinary reported the cause upon informations.

The Court found the action competent.

Reporter, Lord Justice-Clerk.
Clerk, Home.

A&A. Jo. Millar, junior.

Alt. Muir.

S.

N^o CXCV.

December 13. 1791.

CREDITORS of DAVID CURRIE,

AGAINST

WILLIAM HANNAY.

DAMAGE AND INTEREST.—*The highest offerer at a public roup, who failed to find caution according to the articles, by which the purchase devolved to the next, found liable for the surplus of price.*

BY the articles of roup of Mr Currie's estate of Newlaw, which was sold *judicially*, it was stipulated, "That in case the highest offerer should fail to find caution for payment of the price within thirty days after the roup, the immediately next offerer was to be preferred, &c.; *without prejudice* to the creditors to insist against the several offerers for the surplus parts of the prices offered by them respectively."

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Mr

Mr Hannay was the highest bidder by an excess of L. 290; and it appeared probable, that by his interference the price had been greatly enhanced. From some accidental cause, however, he failed to find caution within the time prescribed. He afterwards presented a regular bond, but the right to the purchase was then claimed by the next offerer, on whom, by the articles, it had devolved. This point was afterwards the subject of a litigation, in which Mr Hannay was unsuccessful*.

An action having been brought against him for payment of the surplus part of the price offered by him, he, in defence,

Pleaded: The articles of roup, it is plain, conferred no new right. The terms "without prejudice," instead of creating any such, could only reserve what already existed at common law. Now, the common law does not seem to warrant a claim of penalty or damages, like the present, against a party who has committed no fault, and has given occasion to no loss. On the contrary, the defender's appearance as a purchaser has actually produced a large augmentation of price. A special stipulation, therefore, would have been necessary for the support of this action.

Answered: The question here regards not any penalty, but a claim of indemnification, plainly arising *ex contractu*. The highest price offered, which is not to be presumed more than adequate to the value of the lands, was that which the creditors were intitled to receive; and since it has been by the defender's failure withdrawn from them, they have a right to be indemnified of the resulting loss.

The Lord Ordinary took the cause to report on informations.

The Court found Mr Hannay liable for the difference of price.

A reclaiming petition being advised with answers, was refused.

Reporter, Lord Stonefield.
Cathcart. Clerk, Home.

A&S. Corbet.

Alt. Dean of Faculty,

S.

* Page 58. *sup.*

N^o CXCVI.

December 23. 1791.

REBECCA HOG,

AGAINST

THOMAS HOG.

HERITABLE AND MOVEABLE.—*Investments in the government funds moveable.*

AMONG the effects which belonged to the father of Thomas and Rebecca Hog, was a large sum of money invested in the government funds, viz. the 5 per cent. annuities. And Rebecca being intitled to legitim, it became a question between her and Thomas, who was their father's universal disponee, whether those annuities should be considered as moveable, and so coming under, or as heritable, and exclusive of, that legal provision. For the former, it was

Pleaded: Rights, it is true, which yield a yearly profit *per tractum temporis*, without relation to any capital sum, stock, or *fors*, are accounted heritable. But, on the other hand, annual profits which do arise from a *fors* are as certainly moveable; Ersk. b. 2. tit. 2. § 8. The point then to be determined is, Whether those government annuities are to be held as connected with a *fors*, or not.

When money is lent, its owner is instantly changed from the lender to the borrower, the former in return acquiring a *jus crediti* against the latter; who, in particular, becomes answerable to him for the yearly profits of the sum. In this case, the existence of a *fors* was never doubted. Now, let it be asked, what is that *fors*? Plainly nothing else than the *jus crediti* of the lender against the borrower.

In the same manner, upon a share being purchased in the stock or capital of any trading company, whether public or private, the price indeed ceases to be the property of the purchaser, being sunk in the company-stock; but there is substituted for it a *jus crediti* against the company, including a claim to a corresponding share of such profits as may eventually result. Of this, therefore, the *jus crediti* is the *fors*; and as it comprehends the whole interest of the partner, this is of course a moveable, and not an heritable subject.

On that principle, a share of the capital stock of the African Company, due out of the equivalent, was found to be moveable; Forbes, 25th July 1710, Murray *contra* Blackwood.

And

And the same decision was given in respect to shares in the stock of the Bank of Scotland, 1st July 1755, Dalrymple *contra* Halket; Dict. *voc.* Heritable and Moveable.

Now, if in the above-mentioned instances the *fors* was a *jus crediti*, why should not the *jus crediti* against government in the present case be less accounted a *fors*? As there seems to be no room here for any distinction, the moveable nature of the money vested in those government annuities must be admitted.

Besides, it is to be remarked, that both by the nature of these particular annuities, and by the terms of the statutes respecting them, they are moveable, and descendible to executors. 1. They were created in order to fund a floating debt, due by navy, victualling, and transport bills, and by ordnance-debentures, which was moveable in every sense of the word. 2. The statute 25th George III. c. 32. § 7. declares, "that the annuitants shall be possessed thereof as of a personal estate, not descendible to heirs."

Answered: It is admitted, that stock in trade, or that of the public banks of this country, is moveable. But the government funds are of a very different nature. The profits of the former kinds of stock are variable, or wholly casual. The annuities in question, on the contrary, being fixed and determinate, can neither rise nor fall.

On this distinction was founded the decision relative to the shares in the stock of the Bank of Scotland. The argument employed against that judgement was, that the price being sunk in the company's stock, and, of course, the profits not being accessory to any capital belonging to the partner, his interest fell under the definition of a right having *tractum futuri temporis*. But "the defect in the argument lay in this, that though in one sense the money might be said to be sunk in the company's stock, in so far as it could not be taken up without the general consent of the company, yet there was nothing perpetual, secure, or permanent in the annual sum to be drawn for it, which might be great in one year, small in another, and, in the event of the bankruptcy of the company, less than nothing. In short, it could be considered in no other light than the stock of any other trading company, which was altogether casual, and dependent on the success of the adventure."

"These annuities fall directly under the description of rights which have a *tractus futuri temporis*. They are of such a nature, that they cannot be at once paid or fulfilled. They are to continue for an indefinite number of years; for, till twenty-five millions of the 3 and 4 per cents be paid, they are *irredeemable* even by the public. And at no period is there a right of redemption in the annuitant, who has no title to demand a supposed principal sum, which the public never pay, or any thing else than his annuity. Indeed, farther than that their amount was thereby fixed, the annuities have no relation to a capital sum or stock."

With respect to the statute, § 7. it "declares, *not* that the annuities shall be a personal estate, but that the annuitants shall be possessed thereof

thereof *as of* a personal estate; and that they shall not be descendible to heirs, *as sua natura* they were."

The Court found, that the subject in question was moveable, and fell under the right of *legitim*.

For Mr Hog, *Lord Advocate*.

Alt. G. Fergusson.

Clerk, *Sinclair.*

S.

N^o CXC VII.

January 21. 1792.

ADAM WATSON,

A G A I N S T

JAMES RENTON.

FOREIGN.—*An English certificate of conformity effectual in Scotland to protect the person of the bankrupt from diligence on English debts.*

The price of goods furnished in Scotland to the order of a person in England, not held an English debt; but a bill payable in England being taken from the debtor, this renders it such.

IN consequence of a commission sent by Renton, a merchant in Berwick-upon-Tweed, to Watson, a merchant in Dunbar, the latter sold to him certain goods, which were delivered at Dunbar to a common carrier employed by Renton to receive them. For a part of the price, Watson drew a bill on Renton, which he accepted, payable in four months at Renton's house in Berwick. The remaining part was to have been paid in ready money.

Before the bill became due, the other sum being likewise unpaid, a commission of bankrupt, under the English statutes, issued against Renton, who obtained a certificate of conformity, which was *allowed* by the Lord Chancellor. To those proceedings however, Watson had no access.

Watson afterwards made application to the sheriff-court of Berwickshire, for a warrant to arrest the person of Renton, called a *border-warrant*, which was granted, but recalled by the Sheriff, on account of the above-mentioned certificate.

This judgement having been brought under the review of the Court, the question came to be tried concerning the validity of those English proceedings, as a bar to this personal diligence; it being enacted by the English statute, 5th Geo. II. cap. 30. that "an allowed certificate is a bar and discharge against any action for any debt contracted before the issuing of the commission:" Which question invol-

ved two points; 1. Whether or not, even in the case of English debts, such an effect ought to be recognised; and, 2. Whether those in question were English or Scotch. For Watson, the creditor, it was

Pleaded: 1. The primary object of the English commission of bankrupt is to derive, from the jurisdiction of the Lord Chancellor, protection to creditors against the frauds of their bankrupt debtors. For this end the bankrupt is enjoined, under severe penalties, to disclose and surrender his whole effects. But unless within the peculiar territory of that magistrate, it is obvious there cannot exist either a title to that assistance, or the means of affording it. On the other hand, the bankrupt, upon making a fair surrender, obtains, in his turn, under the same authority, a protection against all claims of debt prior to the commission. Those mutual protections are plainly commensurate, and limited by the territory which confines the powers from which they both proceed.

In respect to persons, therefore, who live beyond the jurisdiction of the Lord Chancellor, and have no participation in such procedure, this interposition in behalf of the bankrupt is a mere *ex parte* order, without coercive authority. “Extra territorium, jus dicenti impune non paretur.”

It is a common rule, indeed, that effect ought to be given to foreign decrees *ex comitate*; but the expression would be more accurate if this were styled a dictate of equity, or of the law of nature and nations. Now nothing that is unjust can derive any sanction from that source; and nothing can be more unjust, than to debar a creditor from full payment of a debt that is due.

This, however, has been vindicated, by calling it an extinction of an obligation by the *lex loci contractus*, and a consequence of this law regulating the constitution and the transmission of obligations. It is, however, an improper inference.

The great principle to be regarded as a criterion in a question like this, is implied in the very notion of property, viz. that no man can be lawfully deprived of it without his consent, presumed, at least, if not real, or without a delict on his part inferring forfeiture.

Now, in the constitution of an obligation according to the *lex loci*, a consent both real and presumed is implied; real, as the parties made choice of the mode; and presumed, as a new form, perhaps, could not afterwards be obtained, so that otherwise injustice would be done. Hence, no objection can arise to those decisions which have sustained deeds executed according to the formalities of England, or of other countries.

The same consideration is applicable to the transmission of obligations, the assignee being intitled to rely on the efficacy of the same forms in transmission as in the original constitution.

Nay, it might even be admitted, that the endurance of a debt constituted in England, when sued for in this country, may be regulated by the English statutes of limitation instead of the Scotch prescriptions; for as those limitations are barred, except both parties have lived all the while in England, there arises thence a strong presumption of payment, to which nothing can be opposed but the supposition

tion of great negligence; and therefore it is a matter remote from the present discussion. In fact, however, the contrary seems to have been found in the case of *Renton contra Baillie*, 7th July 1755; and in that of *Randall contra Innes*, 13th July 1768, Fac. Coll.

In the other, more pertinent, instances there was room for a presumed consent. But upon what principle is a creditor to be presumed to have consented to the Chancellor's injunction, by which his debtor, contrary to justice, is to be absolved from every claim, however small a part of the debt he may have paid?

It is no doubt a just rule of the Roman law, that "*qui vult quod antecedit, non debet nolle quod consequitur*;" and accordingly, as far as the operation of the certificate is a necessary consequence of the contract, it is just in regard to the creditor, who when entering into it should have known, that he could have no action for any prior debt in the English courts. But this could not vary the inherent justice of his claim, though it might render it so far inefficacious; and therefore beyond that territory, the demand, no longer restrained by a local regulation, must become effectual on the general principles of equity. On that ground of inherent justice, accordingly, action was sustained for an English debt against an heir, who, as not being specially bound, would not have been liable in the *locus contractus*, any more than a bankrupt after obtaining an allowed certificate; *Kinloch contra Fullarton*, 12th July 1739, Dict. vol. i. p. 318.

Nor do the English bankrupt-statutes seem intended to produce an absolute extinction of debt. The statute 5th George II. declares, that if a bankrupt be arrested or impleaded, after the allowance of the certificate, "a verdict shall thereupon pass for the defendant," which is in effect to deny the aid of the English courts for execution on such debts; but to enact a like denial of execution in countries under a different jurisdiction, could not have been meant. Thus too the whole detail of procedure is exclusively adapted to England; Blackstone, b. 2. ch. 31. § 4.

Such a destination cannot reasonably be attributed to any statutes. It is obvious, that the bankrupt's surrender of himself and of his effects, and the discharge or protection which he obtains, are counterparts to each other; as the former is plainly not to be justified but in virtue of the latter. Where this then cannot be enforced, that cannot in justice be required; and by necessary consequence, both must be confined to the same jurisdiction. Such appears to be the sense of English lawyers, particularly of Lord Chancellor Talbot, who, when at the bar, gave it as his opinion, "that an English certificate would be no discharge if a suit were commenced against the bankrupt in Virginia, or the other plantations, to which the statutes do not expressly extend." Davies, Law of Bankrupts, p. 439.; Cuninghame's Law Dictionary, *voc.* Bankrupt.

That the commission of bankrupt in England cannot produce any transference of effects in Scotland, is now unquestionable, and will be admitted. From this, however, it plainly follows, that the bankrupt continues here still vested with his property, while in England he is completely divested; and therefore, to exempt him notwithstanding

standing from personal diligence, were not to give either to English laws or to English rights, an operation similar to that which obtains in England, but one infinitely different. In that country the surrender is the sole cause of the immunity, without which no title to it could exist. In this, that cause is wanting, and consequently what might be right there, would here be wrong.

With regard to the decisions of the Court, relative to the defence founded on those English statutes against personal diligence in Scotland; that in the case of *Rothead contra Scott*, which sustained the effect of the certificate, appeared to rest on the tacit consent of the creditor, implied in adopting the English form of his bond; Edgar, 30th June 1744; and in that of *Christie contra Straiton*, 4th November 1746, a similar judgement seemed to proceed, on the idea of Scotch effects being *ipso jure* vested in the assignees. But the groundlessness of this notion was evinced by the decision, 13th November 1747, *Ogilvie contra Creditors of Aberdeen*, which found, that moveables in Scotland were not affected by such foreign procedure.

In the case of Galbraith's creditors, the Court at first refused to sustain the above-mentioned defence founded on a certificate of conformity, Fac. Coll. 1st July 1762. And, at the same time, in that of *Forrest and Sinclair contra Assignees of Thomson and Tabor's estate*, it was found, that the proceedings under the commission did not bar the prior English creditors from attaching the bankrupt's effects in Scotland.

But, though a contrary judgement was afterwards given in Galbraith's case, the first judgement in that of *Forrest and Sinclair* was adhered to at a still later period, viz. 5th March 1767, which indicates, that the principle of the first judgement in the other question was then recognised. For if the debts had been extinguished by the certificate, how could diligence proceeding on those very debts have been sustained? Fac. Coll.

This at least is certain, that the latter judgement in the case of Galbraith was never acknowledged as fixing the point. For in 1771, in that of *Coalston contra Stewart*, the general question was made the subject of a hearing in presence, though from some unforeseen circumstance it became unnecessary to determine it.

Indeed many other objections to that doctrine might be suggested. A succession of advertisements in the London Gazette is requisite for giving effect to the commission of bankrupt, and it is indispensable that none of these be omitted; but in regard to persons in Scotland, they must be held to be all omitted. To us the London Gazette is no more a legal channel of intimation, than any other foreign newspaper.

The improbability too may be remarked, of our decrees of *Cessio bonorum* being allowed effect in England, though a discharge not so extensive, or, of course, so contrary to equity, as their certificate of conformity. The same observation may be made, in respect of our statutory exception to deeds executed sixty days before bankruptcy. But it will be easily granted, that the degree of deference respectively due to the municipal institutions of the two countries must be reciprocal.

It

It is also remarkable, that such an effect, in our courts, seems never to have been ascribed to the English insolvent acts; and yet no distinction in this respect, founded on principle, occurs between these and the bankrupt statutes.

Last of all, it must be admitted on the other side of the question, that the operation of the certificate is at least so far different in the two countries, that though in England the debts viewed as extinguished cease, from the time of the commission, to give to individual creditors, the right of attaching the bankrupt's property, they subsist nevertheless in Scotland unimpaired to that effect, as a legal claim against the debtor.

It is a concession, however, which seems to include the whole of the present argument, viz. that the discharge and the surrender are correlative and reciprocal; or rather that the former is a mere equitable consequence of the latter; so that the one neither ought nor can be supported, where the other cannot be enforced. For surely it is a singular notion of a discharged debt, which yet admits its existence, to authorise a claim against the debtor's property; and one not less singular, which, after going thus far, denies the power of arresting his person; notwithstanding that the right of attaching property must ever include that of using the means, of which, with respect to moveables, the chief perhaps is diligence affecting the person.

2. But at all events those English statutes can never extend to debts contracted in Scotland, and such was the debt in question. Dunbar was the *locus contractus*. There the commission for the goods was given and accepted, and the sale perfected by mutual consent. Voet, *ad tit. Dig. de jud. et ub. quisq. ag. vel conv. deb.* § 73. At the same place too, delivery of the goods was made, which from that moment were at the risk of the buyer.

A bill, it is true, payable at Berwick, was drawn and accepted for a part of the price; but this did not change the nature of the debt. It subsisted independent of the bill, which the creditor might safely relinquish or destroy at his pleasure; as the granting of this, for the convenience of the creditor, could afford no *jus quesitum* to the debtor.

Answered: 1. In Scotland as well as in England, the certificate of conformity operates in favour of the debtor, a discharge of all debts contracted before the bankruptcy.

It has been termed a bar to execution. If so, it is a perpetual one, and similar to a decree suspending the letters *simpliciter*, which is equivalent to a decree absolviatory from an action of debt.

In fact, by the express terms of the statute, the certificate is an absolute "discharge from all debts due or owing at the time when the party became bankrupt;" Blackstone, vol. 2. p. 483. Nor if this part of the English jurisprudence had been deemed either unjust or impolitic, would it have been adopted and transferred into our law by the late bankrupt-act.

It has been objected, that this English statute cannot have ef-

fect *extra territorium*. This objection, however, is little connected with an argument concerning rights that result from laws *intra territorium*. In this way, contracts and obligations perfected according to the *lex loci*, create rights, which ought to receive effect every where. Thus persons married in England, according to the law of that country, will in this be equally acknowledged in that state. So also the discharge of an English debt agreeable to the English forms will be no less valid in Scotland.

With regard to the distinction stated between claims founded in justice, or in the law of nature and nations, and those considered as unjust, and authorised solely by municipal institutions; it may be asked, what is the criterion of this supposed injustice. Nations have no title to judge so harshly of each others jurisprudence. The general and reasonable presumption is, that the laws of every people are suited to its situation, and connected together; and, if the expression may be pardoned, it would be a high degree of national insolence, to alter and invert, according to our particular notions, the rights which by the law of his own country are competent to a foreigner, or the obligations which by the same law he lies under.

It should seem, therefore, that the Court would not deny effect to a foreign decree if conformable to the *lex loci*, though such law might be deemed unwise or unjust. In one case indeed execution was refused here on a decree of the court of King's Bench, from an apprehension of its being contrary to justice, and to the true meaning of the statute on which it proceeded; Select Dec. 6th January 1756, *Burnton contra Chalmers*. But that judgement was reversed on appeal, and an opposite decision given afterwards in the similar case of *Leacock contra Clerk*, 22d July 1767, Fac. Coll.

If then a decree of an English court were now produced, affording Renton from an action at the instance of Watson, in virtue of the statutes of bankruptcy, effect would not be denied to it; and it is obvious, that the present case is tantamount to that.

But it must be allowed at least that we are not to consider our own law as unjust. Now by our late bankrupt-act the discharge authorised by the English statutes has been adopted, and it is now a law common to both kingdoms. The forms indeed by which the discharge is obtained have their respective differences; but the right itself is the same in the one country as in the other. This is a circumstance which makes the present question to wear quite a new aspect, and seems alone decisive of the cause. Such, too, is the unavoidable inference from the admissions on the other side of the question.

In support of the position, that the English bankrupt-statutes can produce no effect *ultra territorium*, it has been said, that each regulation bears a peculiar reference to the judicatories and magistrates of that kingdom. But though the certificate may not obtain a more extensive operation *viribus statuti*, this is no reason for withholding effect from the substantial right which thence results; otherwise no force could be allowed to any foreign contract, the formalities of which must always relate particularly to local institutions.

As for the opinion of Lord Talbot, it does not appear but that the debts

debts treated of were colony-debts instead of English; and at any rate, on a point of the law of nature and nations, no peculiar deference can be claimed to the sentiments of any municipal lawyer.

The decisions of the Court of themselves establish the present argument. But before stating them, an important distinction is to be remarked. Though rights arising from foreign laws or decrees ought undoubtedly to receive effect, the laws themselves are to have no farther operation than is necessary to gain that end. Thus, in the present instance, the English statute affords a title in law, on which an action may be raised, and a defence founded; or a *jus ad rem*, which, by means of our proper forms, may be rendered a complete right; but it cannot produce a direct transmission of Scotch property.

The first case is that of Rothead, 30th June 1724, in which the certificate was sustained as an extinction of debt in England, and consequently every where; Edgar's Collect.

The next, that of Christie, 4th November 1746, underwent a very deliberate discussion, as appears from a full detail of the argument in Kilkerran, *voc.* Foreign. There the pursuer was found to be barred by the certificate, "from recovering his payment out of the effects acquired by the defender after the said commission of bankrupt."

In the following year, the case of Ogilvie occurred, in which arresters of Scotch effects were preferred, on the ground which excludes an *ipso jure* transference by the English proceedings: a decision, as above shown, perfectly consistent with the foregoing.

The question between the heir and the creditors of Galbreath followed, 1st July 1762; and as the plea founded on the certificate was, in that case, deemed peculiarly ungracious, it was indeed at first rejected; but afterwards it was finally sustained; Fac. Coll.

The case of Thomson and Tabor, stated on the other side, as of a contrary tendency, was in reality the same as that of Ogilvie; it being found in like manner, that Scotch effects did not vest in the assignees *ipso jure*. To have argued there, that the debts of the arresters were extinguished by the certificate, would have been highly absurd. It is manifestly in questions between the creditors and the bankrupt only, that the effect of the certificate can be matter of discussion. In competitions between the creditors themselves respecting subjects acquired before bankruptcy, there can be no room for such a question.

The result then of the whole enquiry is, that the Chancellor's certificate must be allowed to operate, in Scotland as well as in England, a discharge of any English debt which was owing at the period of the bankruptcy.

2. As to the question, how far the debt is to be accounted an English one; it is to be observed, that the place of the contract of sale was of no importance. The sale, no doubt, was the remote cause of the debt; but it is only of this itself that the place is to be considered. Nor was the delivery of the goods to a carrier more than a step towards creating it: for though the risk then lay on the buyer, it was merely from his having prescribed this particular mode of conveyance.

Now

Now the *locus* of the debt was Berwick, as the debtor became there finally answerable for it; a rule laid down by the above-cited decision, *Christie contra Straiton*, which found a debt to be an English one, because the subject from which it arose was to be accounted for at London. Besides, the bill here being made payable at Berwick, this excludes all doubt concerning that part of the debt.

The Lord Ordinary sustained the defence founded on the certificate in question.

On advising a reclaiming petition and answers, the Court appointed a hearing in presence, which took place.

Observed on the Bench: If the creditor in an English debt expressly agree, that in reference to it he shall continue subject to the English bankrupt-law, there can be no doubt of the validity of such a paction. The same agreement seems here to be implied; nor is it the less intitled to regard, that it is not express, but tacit.

It was likewise observed, That the point was still unsettled by the former decisions; and that, on occasion of the discussion in the case of *Stewart contra Coalston*, doubts had been expressed by very eminent judges, in respect to the propriety of the judgement in that of *Galbraith*.

“ The Lords found, that the Lord Chancellor’s certificate of conformity, obtained by James Renton in England, does operate as a proper discharge, so as to bar action in this country as to Mr Renton’s accepted bill; but as to the other debt, find, that the Lord Chancellor’s certificate does *not* operate as a proper discharge, so as to prevent the execution of a border-warrant, or an action in this country.”

Lord Ordinary, *Hailes*. For Watson, *Dean of Faculty, Stewart, A. Campbell junior.*
Alt. *Macleod-Bannatyne, Sir W. Miller, Hope.* Clerk, *Colquhoun.*

S.

N^o CXCVIII.

January 21. 1792.

ROBERT ARMOUR,

A G A I N S T

JOHN CAMPBELL.

FOREIGN.—*A bill being drawn in a foreign state on a person in Scotland, though not accepted, creates a debt, which is held not to be a foreign, but a Scotch one.*

CAMPBELL, a Scotsman, who was settled as a merchant at New York, became indebted to Armour in the course of trade. Towards payment of a part of the debt, Campbell drew a bill on his father at Greenock, payable to Armour, which, however, was not accepted.

Soon afterwards Campbell became bankrupt, and, by the law of that state, obtained a statutory discharge, similar to that resulting from the certificate of conformity in England.

On his returning to Scotland, personal diligence was raised against him upon the bill, which he brought under suspension, on the ground of the claim being extinguished by the act of the *lex loci* above mentioned. This plea gave occasion to the same sort of discussion as occurred in the preceding case of Watson *contra* Renton.

But on the part of the charger it was *separatim*

Pleaded: The sum due by this bill must be considered as a Scotch debt; because, though drawn at New York, the bill was made payable in Scotland. The rule of law is thus laid down by Julianus: "Con-
"traxisse unusquisque in eo loco intelligitur, in quo ut solveret se
"obligavit;" l. 21. ff. De oblig. et act. Vid. etiam l. 1. 2. et 3. De reb.
auct. jud. poss. Voet ad tit. De judic. § 73.

With respect more particularly to bills of exchange, the interests of the parties are ever to be regulated, not by the law of the country where they are drawn, but by that of the place in which they are negotiated. Voet, ad tit. De naut. fæn. § 10.; Dict. voc. Foreign, 25th July 1732, Rodgers; Fac. Coll. 13th June 1761, Brown; 14th November 1764, Stevenson; Strange's Rep. vol. 2. 733, Burrough v. Jemino.

Answered: If the drawee had had funds of the drawer's in his hands, or had he accepted the bill, then a debt must have arisen against him, which no doubt would have been a Scotch one. But the case being

reverse, there is here only a claim of recourse against the drawer at New York ; and this as plainly a foreign debt as any one can be.

Nor do the authorities quoted tend to contradict this observation. In the cases of Brown and of Stevenson, it was only found, that the drawer was liable in recourse for exchange according to the rate of the place of payment, and that the forms of negotiation in practice there should be followed out ; points which do not at all affect the present question. And the passage of Voet last cited is exactly of the same tendency.

In the case of Rodgers, the English statute of limitation was found not to cut off a debt due in Scotland ; and, on the same principle, the debt in question ought to be exclusively regulated by the law of New York.

That quoted from Strange's reports shews, in like manner, how debts are regulated by local laws, but has no tendency to prove, that the *locus* of the present debt is Scotland, and not New York.

The Lord Ordinary "sustained the reasons of suspension." But the case coming under review by a reclaiming petition and answers, the Court ordered it to be heard at the same time with that of Watson and Renton ; after which

The Lords altered the Lord Ordinary's interlocutor, and "found, that in the circumstances of the case, the statutory discharge obtained in the State of New York cannot bar the charger from recovering payment of the sums due to him in this country by the ordinary diligence of the law of Scotland."

Lord Ordinary, *Justice-Clerk*.
Clerk, *Menzies*.

Adv. *Craigie*.

Adv. *Macleod Bannatine*.

S.

N^o CXCIX.

January 21. 1792.

CREDITORS of MACALPINE and Company,

A G A I N S T

PARSONS and GOVETT.

BILL OF EXCHANGE.—*Regular negotiation, how far required in accommodation-bills.*

FOREIGN.—*Bills drawn on persons in England regulated by the English law.*

THOMAS JEFFREY of London accepted a bill drawn on him by Macalpine and Company of Perth. It was afterwards indorsed successively to three different parties in England, the last of whom were Parsons and Govett.

Macalpine and Company having become bankrupt, it was, in a competition among their creditors, *objected* against the claim of Parsons and Govett, that by the failure of regularly negotiating the bill, which, though due 27th June, was not protested for non-payment till 16th July, recourse against the drawers was cut off. At the same time it was admitted, first, that the acceptor was not possessed of any of the drawers funds; and next, that before the term of payment the acceptor and the other indorsers, as well as the drawers, were all bankrupt. Commissions of bankrupt too had issued against them all, Macalpine and Company having an estate in England; so that before the bill was payable, the acceptor's bankruptcy had been announced in the Gazette; and within the days of grace the bill was proved against some of the indorsers, and against the drawers. In support of the objection, it was

Pleaded: It is a rule resulting from the nature and object of bills of exchange, that they should be negotiated with the strictest adherence to the established regulations. No reasoning concerning equipollencies is to be admitted, nor is any room to be left on this head for doubt or conjecture.

Hence in all cases without exception, accepted bills, if dishonoured, ought to be regularly protested, and the dishonour to be notified in due time. For it is not sufficient to alledge, either that the acceptor held no effects belonging to the drawer, or that he was previously bankrupt; since by the acceptance he laid himself under an obligation to pay, and it was the duty of the holder in proper time to require

quire payment; nor is it to be known with certainty that it might not then have been obtained.

Accordingly, in the case of Hart *contra* Glafsford, recourse was denied from delay in negotiation, though the drawer had no funds in the acceptor's hands; Fac. Coll. 21st June 1755.

It was in like manner denied in that of Tod *contra* Maxwell, where the acceptor not only appears to have been without effects of the drawer's, but was bankrupt before the term of payment; Ibid. 12th July 1758.

Answered: In general, no doubt, regular negotiation of bills is necessary to preserve recourse; but it is not a rule that admits not of exception. Such unquestionably there are in the cases of bills indorsed in security, and of those which have been indorsed after the term of payment. Nor in instances like the present is there less room for exception.

After the bankruptcy of the acceptor, when the drawers could no longer operate payment from him, what purpose could the notification serve? Besides, as the acceptor had none of the drawers effects, this being an accommodation or *wind-bill*, it was impossible that from want of intimation any loss of these could arise. Recourse therefore ought not to be precluded.

This inference is supported by the opinion of Mr Erskine, and by the decision in the case of Macwilliam; Erskine, b. 3. tit. 2. § 34. Fac. Coll. 14th June 1787.

At the same time it may be observed, that the circumstances which took place truly afforded the most effectual mode of notification.

But there is quite a separate ground for admitting the recourse. For the bill having been payable in England, where undeniably it would not be cut off, it is to be judged of by the English law; Fac. Coll. 13th June 1761, Brown *contra* Crawford; 4th November 1764, Stevenson *contra* Stewart and Lean.

The Lord Ordinary reported the cause.

The Court appeared to be moved by all the different reasons stated in answer to the objection, which was therefore repelled.

Lord Ordinary, Henderland.

A&S. Honyman.

Alt. Fletcher.

Clerk Sinclair.

S.

N° CC.

N^o CC.

January 31. 1792.

JOHN RUSSELL, HUGH ROSS, and others,

A G A I N S T

CREDITORS of HUGH ROSS of Kerse.

REAL AND PERSONAL.—TAILZIE.—*An entail not followed by infestment, not effectual, though recorded, against the real diligence of the creditors of the institute, he being also heir of line.*

THE father of Hugh Ross, who stood infest in the lands of Kerse, executed an entail of them, containing the usual clauses, in favour of him as institute, and of a series of substitutes.

The deed was recorded in the register of tailzies. But seisin did not follow upon it.

Mr Ross, after his father's death, *expede* a general service as his heir of line, but made up no titles under the entail.

He had contracted considerable debts, as his father also had done; and some of his creditors having charged him to enter heir of line in special to his father, led adjudication, which was completed by infestment.

A process of sale having been raised, the estate was purchased by Mr Russell; after which a doubt was entertained, whether or not the entail, personal as it was, precluded the above-mentioned diligence. In order to try this point, on which the right of the purchaser depended, an action of reduction at the instance of the creditors was raised, in which the purchaser, together with Mr Ross, and the other heirs of entail, were called as defenders. On the part of the pursuers it was

Pleaded: No personal right, such as that resulting from the entail in question, could ever be placed in opposition to the real right of a creditor-adjudger completed by adjudication, if proper attention were given to the distinction between those different kinds of right.

The first is that by which a person is vested in the property of a subject; the other that which gives a title or claim to become so vested, but does not transfer the property. Thus, if any one infest in lands convey them to a party, who postpones the taking of seisin, and if in the mean time he again disposes them to a different person, by whom infestment is immediately obtained; the latter alone becomes proprietor, or is vested with the property, while nothing remains to the

the former but a personal action against the fraudulent disponer. In like manner, before a disponee be infeft, he may be cut out by an adjudging creditor of the disponer's, whose right is completed by feisin; Rem. Dec. 22d June 1737, Bell *contra* Garthshore; Fac. Coll. 13th February 1781, Mitchels *contra* Ferguson.

Now Mr Ross's father, who was infeft in the estate, granted a disposition in favour of a series of heirs of entail, on which, however, feisin did not follow. The granter, therefore, during his life, continued vested in the property of the estate; and at his death, it was *in hereditate jacente* of him, being then subject to a twofold claim or personal right; first, that of the heirs of line, and next that of the heirs of entail. Both these rights belonged to Mr Ross, and under either of them he could become vested in the fee. If he did so as heir of line, by special service and infeftment, a claim of forfeiture no doubt against him would thence accrue to other heirs of entail; but it is perfectly obvious that this presupposes him in the first instance, to have acquired the unlimited right of property. Hence, being fully vested, he could dispose with effect; and the right of the disponee would be unchallengeable, when clothed with infeftment. For the same reason his creditors could adjudge with effect, the special charge authorised by act of parliament 1540 being equivalent to a special service.

For farther illustration, let it be supposed that Mr Ross's father, instead of a deed of entail, had executed a conveyance to an onerous purchaser, which certainly will not be supposed a less valid disposition. It is clear, that if this purchaser remained uninfeft, another purchaser acquiring right from Mr Ross, might have effectually vested himself in the property by adjudication in implement; or any creditor-adjudger could have equally obtained a complete real right.

The registration of this entail is nothing at all to the purpose. The statute of 1685 superadded that new requisite for the safety of creditors and of purchasers; but has no tendency to render a personal right a real one, which alone could have effect against the complete real diligence in question.

Nor could creditors or purchasers derive any advantage from this registration in the record of tailzies, when that of feisins gave them no information of the existence of such a restraint on the property.

These observations received the sanction of the Court, in the case of the creditors of Douglas of Kilhead in 1765*.

Answered: Mr Ross's right is subject to forfeiture, in virtue of the irritant and resolute conditions of the entail; so that a declarator of irritancy at the suit of the substitute heirs, would intitle them to hold the estate unburdened with debts, and should seem to lay the subjects purchased open to eviction.

For the argument founded on the want of feisin seems to be obviated by the statute of 1685. It requires, indeed, the insertion of the irritant and resolute clauses in the instruments of feisin; and if

* Not collected.

there had been infestment, this requisite would here have been essential; but as there was not, it is enough that the limitations appear on record in the procuratory of resignation.

Accordingly, in the case of Denham of Westshiels, it having been found, that a personal entail was ineffectual against creditors, that decision was reversed on appeal.

The Lord Ordinary reported the cause on informations, when a hearing in presence was appointed, and it was ordered, that the informations in the case of Kilhead should be reprinted, for the perusal of the Court.

On advising the question, however, the Court were unanimously of opinion, that the personal entail could have no effect against the real right of the creditors, and that this was a point which admitted of no doubt. And it was observed, that what had given occasion to so ample a discussion, was an opinion expressed on the Bench in the case of Thomson against Douglas, Heron, and Company, "That adjudging creditors stand in a different predicament from disponees, as they must take the right of their debtor *tantum et tale* as it is in his person;" Fac. Coll. 15th November 1786; an opinion now stated to have been erroneous.

Reporter, *Lord Swinton*.
Clerk, *Sinclair*.

For the Creditors, *Rolland et alii*.

Alt. *Wight et alii*.

S.

N^o CCL.

January 31. 1792.

CREDITORS of AUCHINDACHY,

AGAINST

ISAAC GRANT.

PRESCRIPTION.—TAILZIE.—*Years of minority of substitutes not to be deducted.*

ALEXANDER AUCHINDACHY was first heir of entail under a deed executed by his father, and his sister was the next.

He made up titles, however, as unlimited fiar, on which he possessed the estate for the period of prescription.

During

During a part of this time, his sister, the person in immediate substitution, was minor; and it came to be objected to his prescriptive right, that the years of her minority ought to be deducted. But the Court, as in the case of Gordon *contra* Gordon, 21st December 1784, Fac. Coll. and in other prior ones there quoted, considering, that in this way prescription could scarcely ever have effect against entails, as some of the substitutes would probably be always in minority,

Found, that the years of the minority of the substitute were not to be deducted.

A^d. Wolfe-Murray.

Alt. G. Fergusson.

Clerk, Menzies.

S.

N^o CCII.

January 31. 1792.

ROBERT GRAY,

AGAINST

WALTER FERGUSON.

SERVITUDE.—A negative servitude granted by a written contract, effectual against a singular successor, without registration, or any previous visible exercise of the right.

MR GRAY obtained from John Cleland a feu-right to a piece of ground, in which he took seisin in January 1753.

Having built a house on it, he, in September 1753, got from Cleland another feu-right to an adjoining piece of ground; and in this deed the following clause was contained: "That nothing should be built on the contiguous property towards the north, so as to interrupt or prejudice the lights or prospects of the said Robert Gray's house." On this, however, infestment did not follow till February 1757.

In December 1753, three months after the date of the second feu-right, the author of Mr Fergusson acquired from Cleland that contiguous property towards the north, by a feu-contract, on which he was infest in March 1756, almost a year before seisin was taken on the conveyance

veyance which constituted the servitude. Nor was any notice taken of it in the last-mentioned feu-right.

No act of possession followed, nor was there room for any during many years. At length, in 1791, when Mr Ferguson was proceeding to build on the ground, an interdict was applied for and obtained by Mr Gray, for stopping the work, as contrary to his right of servitude. In opposition to this claim of servitude, it was

Pleaded: Servitudes, it is true, may be constituted without infeftment. But, on the other hand, in respect to singular successors, a mere latent deed is by no means sufficient for that purpose. Possession is ever indispensably necessary, either preceded by an express grant, or continued during the years of prescription; Stair, b. 2. tit. 7. § 1.; Ersk. b. 2. tit. 9. § 3.

This rule applies indiscriminately to servitudes, whether positive or negative. The latter indeed, while nothing occurs tending to contravene them, may not, like the former, be capable of actual use or possession; but they admit what in the Roman law is termed *quasi* possession. The right may be ingrossed in the title-deeds and infeftments, of both the servient and dominant tenements; or it may be established by a declarator. It ought more especially to be inserted in the infeftments of the servient tenement, that it may appear on record for the benefit of those who may purchase that tenement, or lend money on the security of it.

This the proprietor of the dominant tenement can easily effect, so as to render it binding upon singular successors, by requiring the seller, when the intended purchaser is known, to specify the servitude in the disposition; and at all events he can, by an action, and an inhibition on the dependence, oblige the owner of the servient tenement to insert the servitude in his titles, and to infeft himself on these.

Of the opposite doctrine, the consequences would be truly alarming. The complete security which our law affords to creditors and purchasers in respect of landed property is one of its highest honours. In general this depends on our records. But as there are burdens on lands which cannot be learned from these, the law is careful, otherwise to notify their existence. Thus positive predial servitudes may be constituted by private contract, without infeftment or registration; but in order to render them effectual against singular successors, possession, a means of information no less perfect than any record, is indispensably necessary. The case of tacks is another instance of the same kind. But were negative servitudes to require no notification by the records, while in their nature they are incapable of visible possession, there would be a burden imposed on lands, of whose existence the law had provided no means of being apprized; and such an one as might totally annihilate their value. No instance of this can be stronger than the present, where, apart from the purpose of building, the subject in question is of little value.

Publication by the records therefore seems essential to the validity of negative servitudes; though infeftment may not be always necessary, as the same end may be served by inserting in the register of

seifins the bond or other deed by which this servitude is created. Accordingly many instances of that kind, as well as of infestments in servitudes, appear on record.

Answered: In order to constitute any predial servitude, nothing more is necessary, than the consent, on the one hand, of the owner of the servient tenement expressed in writing; and, on the other, such a possession, or exercise of the right, as it is capable of.

Servitudes may likewise be constituted by prescription; in which case it is true, the mere enjoyment or use of negative servitudes, such as that of light and prospect, would not be sufficient, without hindering the owner of the servient tenement *to use* his freedom; Stair, b. 2. tit. 7. § 9. But when the servitude is founded on a grant, then such use or enjoyment is *amply* sufficient. *Ibid.*

It has been admitted, that infestment is not necessary. Of this however the unavoidable consequence is, that publication by the records is no less unnecessary; for it is to the validity of infestment alone that registration is essential. And if such be the state of the law, all questions respecting the expediency of recording deeds imposing servitudes are out of place here; because it is the legislature alone which can make a new law. As to the extraordinary mode proposed, of compelling registration by an action, and an inhibition on the dependence, it is enough to observe, that the law requires no such proceeding.

Mr Erskine accordingly maintains, that “negative servitudes, *e. g.* “*altius non tollendi*, or *non officiendi luminibus*, are accounted effectual “against the singular successors of the granter, without use, by the “bare agreement of parties;” b. 2. tit. 9. § 35.

The Lord Ordinary sustained the claim of the negative servitude; and on advising a reclaiming petition and answers,

The Court adhered to that interlocutor.

A second reclaiming petition having been preferred, and followed with answers, was also refused.

Lord Ordinary, *Hales*.
Advocate, Dean of Faculty, Hay.

For Mr Gray, *Solicitor-General, A. Camptell*.
Clerk, *Home*.

Alt. Lord

S.

N^o CCIII.

N^o CCIII.

February 2. 1792.

CREDITORS OF KENNETH MACKENZIE,

A G A I N S T

HIS CHILDREN.

PROVISIONS TO HEIRS AND CHILDREN.—*A provision by marriage-contract good against creditors, though not payable till after the father's death; interest being due from the periods of the childrens majority or marriage.*

BY his contract of marriage, Kenneth Mackenzie of Redcastle became bound “to make payment to the younger children to be procreated of the marriage, the sum of L. 2000, to be divided amongst them as he should direct by a writing under his hand; the said provisions to be payable only at the father's death, and to bear interest from the majority or marriage of said children, whichever of these events should first happen; and they to be maintained at bed and board ay and until the period at which the interest upon their provisions should fall due and be payable.”

At his death he left four children, all under age and unmarried. Before that time his creditors began to lead adjudications against his estate; as did also his three younger children, in security of the aforesaid L. 2000 of provision, and of the interest from their majority or marriage; and likewise for a certain sum in name of aliment, awarded to them by arbitration some years before his death.

The estate, which was loaded with debts beyond its value, being afterwards brought under judicial sale, the children claimed to be ranked for these sums; the creditors, on the other hand, objecting, that those provisions were not a proper *jus crediti* effectual against them. In support of the objection they

Pleaded: It is clear, in general, that provisions to children, whether constituted by marriage-contract or by bond, if they be not made payable during the father's life, are not effectual against onerous creditors. Harcarfe, 218.—220.; Stair, 20th June 1672, Bannerman; Fountainhall, 17th June 1697, Napier; Fac. Coll. 14th November 1787, creditors of MacTavish, Ersk. b. 3. tit. 8. § 39.

In the present case, indeed, it is declared, that the provision shall bear interest from the marriage or majority of the children. But this is a specialty of no real importance. For though those events might have happened in the father's lifetime, they must have been here understood

derstood as taking place after his death; as it was impossible that any sooner a claim for either principal or interest could arise.

To shew this, suppose a daughter to have been married during the father's life, and to require the interest of her portion; he could have answered, that there was none, however small, which she could call her own, as the amount, to be ascertained by himself, would not be known till his death. Or if a child, after attaining majority, had bequeathed by will his share of the provision, the same answer must have silenced the legatee.

Thus it appears, that during the life of their father the children had no *jus crediti*, and therefore cannot compete with his onerous creditors.

Answered: Although before the father's death the principal sum was not payable, it was nevertheless to become due at the period of majority or of marriage. There was then to be *dies cedens*, though not *dies veniens*. From those terms the provisions were to bear interest, and by consequence the capital, or stock, must have been owing by and a debt upon the father; for to suppose interest to arise without a capital is absurd.

As to the argument founded on the father's power of distribution, it must be admitted, that during his life the children, if all married or of age, would have been entitled collectively to the interest of their provisions; and though an individual could not prefer a separate claim, this is not inconsistent with the *jus crediti* of the whole; which however was the point in question.

The children therefore being vested in the right of their provision before their father's death, it is to be considered as a proper debt, and effectual against his creditors. Kames, 24th January 1724, Lyon *contra* Creditors of Easter Ogil.

The Lord Ordinary, "in respect that, by the conception of the contract of marriage, the father was bound to pay interest upon the sums provided to the younger children of the marriage, from the time of their marriage or majority, though the payment of the principal sum was suspended till the death of their father, found it was competent to the younger children to use diligence in their father's lifetime; and found, that although the father was bound to aliment the younger children according to his circumstances, which would be implied though not expressed, yet, in respect of the state of his affairs, the younger children could not compete with onerous creditors for aliment."

To this interlocutor the Court adhered, on advising two successive reclaiming petitions for the creditors, with answers; the children having acquiesced in the *finding* as to their aliment.

Lord Ordinary, *Justice-Clerk*.
Clerk, *Home*.

For Creditors, *Rolland*.

Alt. *Abercromby*, *Rest*.

S.

N^o CCIV.

N^o CCIV.

February 4. 1792.

MARGARET DALZIEL,

A G A I N S T

JOHN RICHMOND.

PROCESS.—*Oath on reference competent, after the adducing of parole proof.*

MARGARET DALZIEL having raised a declarator of marriage against Richmond, several witnesses adduced by her in support of her libel were examined. The Commissaries, however, found this evidence insufficient, and assolizied the defender.

She afterwards preferred a petition, praying that the libel might be referred to his oath. This the Commissaries refused; and she, having brought the point under review of the Court,

Pleaded: It is indeed reasonable, that before reference to oath, the party referring should renounce all other evidence; because if such oath be not necessary as a means of proof, his only object must be to ensnare his adversary into perjury. But, on the other hand, when all farther proof has been relinquished, the reference is competent and right, notwithstanding that some evidence may have been already brought; the adversary as to this being put on his guard; Voet, lib. 12. tit. 2. § 11.

By certain old decisions, it is true, a reference in these circumstances was denied; for which it is the more difficult to account, as it was always admitted in cases where proof by writing had been attempted; Ersk. b. 4. tit. 2. § 3. But the point was unalterably fixed 24th June 1747, in the case of Law *contra* Lundin, in which it was found, "That a libel might be referred to the party's oath, notwithstanding the depositions of the witnesses;" Kilkerran.

Answered: He who makes a reference to the oath of his adversary ought to be actuated by an expectation that the truth will thereby be declared, having confidence that the adverse party is not disposed to commit the crime of perjury. Were a person impressed with the opposite sentiments, to insist on his adversary's oath, his conduct would be immoral in a high degree; nor in a legal sense, upon the crime's being afterwards perpetrated, could he be viewed in any other light than that of an accessory. But if he has already made his election of a different mean of proof, especially that by witnesses, he betrays

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his

his distrust in the veracity of his opponent, to whose oath the law will no longer leave him at liberty to recur; *l. 11. Cod. De reb. cred. et jur.*

Besides, it is an observation of Lord Stair's, that "allowing the oath of party then would infer perjury and defamation of witnesses;" Irvine *contra* Ross, *inf. cit.* And, on the other hand, the preceding testimonies might create an unjust suspicion of the truth of what the party deponed.

It may be remarked, that there is in this respect a just distinction between written and parole evidence; the former being something which already exists, and which therefore it is natural to make use of, before the creating of new evidence by the latter.

Accordingly there occurs a singularly uniform series of decisions respecting references after parole proof had been attempted. Thus, Colvin, 1st July 1574, Earl of Sutherland; *ibid.* 20th January 1575, Lord Glenbervy; Durie, 15th June 1622, L. Roslin; 29th January 1639, L. Westmuirland; Spottiswoode, 26th January 1630, Duke of Lennox; Hope, 5th July 1617, Finlayson; Fountainhall, 26th February 1686, Horn; Stair, 22d June 1676, Irvine; Clerk Home, 18th November 1717, Macbrair: to all which, the case quoted on the other side is alone to be opposed.

The Lord Ordinary "remitted to the Commissaries, with this instruction, to ordain the defender to depone on the pursuer's reference." And,

On advising a reclaiming petition and answers,

The Lords adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Justice-Clerk.*
Clerk, *Colquhoun.*

For M. Dalziel, *Frazer Tytler.*

Alt. *Stewart.*

S.

N^o CCV.

February 7. 1792.

LYDIA DOUGLAS, and her HUSBAND,

A G A I N S T

The TRUSTEES of Sir CHARLES DOUGLAS.

CONDITION.—*A father who had granted a provision to his daughter, having in an after deed inserted the condition, that if she married a certain person the provision should be void; it was not sustained.*

BY a deed of settlement, Sir Charles Douglas conveyed to certain trustees, for behoof of his younger children equally, of whom Lydia was one, considerable sums of money, and other property.

He afterwards executed a codicil, containing the following condition: "That if my daughter Lydia hath already married Richard Bingham, son of the Reverend *John* (put by mistake for *Isaac*) Moody Bingham, or any other son of his, in such case or event, she shall not at any time derive any benefit or advantage from my said settlement."

Before Sir Charles's death, when this codicil came to the knowledge of his daughter, she was already married to Mr Bingham. She, however, had not been ignorant of her father's disapprobation of the match; which, notwithstanding, was universally allowed to be a suitable one.

Of the last-mentioned deed she and her husband instituted a reduction, in order to set aside the irritant condition, and restore her to the benefit of the former settlement. In support of this action it was

Pleaded: The condition in this case inferred a total forfeiture of the only provision given; and yet it must be admitted that the match was not unsuitable. The benignity and the justice of our law will ever reject such conditions, as being not only *contra libertatem matrimonii*, but also *contra pietatem parentis*.

Thus Lord Stair says: Such conditions are "void, as against the freedom of marriage, which the natural affection of parents obliges them not to violate;" b. 1. tit. 3. § 7. And Lord Bankton's Clauses to that effect "are rejected by our law, and the provision subsists notwithstanding the children marry without such consent, especially if they marry suitably;" b. 1. tit. 5. § 29. In like manner Mr Erskine, b. 3. tit. 3. § 85. And to the same effect are a variety of decisions in Dict. vol. 1. *voc.* Condition; though in some cases, when children

children had been previously provided, such conditions annexed to additional provisions were sustained. Also Wallace, 9th February 1774, *Graham contra Bain*.

Besides, it is to be remarked, that the marriage had taken place before the condition was made known to the parties, and it ought not to be permitted to operate as a snare.

If indeed the father had not bestowed any provision at all on his daughter, no remedy perhaps would have been found; but when he has himself confessed the extent of his natural obligation to provide, this ought not to be frustrated by a capricious or unnatural condition, which therefore must be held *pro non scripto*.

Answered: If the condition annexed by a father to the provision of his child be, that she shall marry a particular person, or not marry at all, it is invalid, as beyond the limits of parental authority; and it is to such cases as these, that the opinions and decisions quoted on the other side are applicable.

But a negative upon a daughter's choice is a power that belongs to a father, which, though it may sometimes be capriciously exercised, it would be pernicious to abolish. Such was the power assumed by the father in the present instance, in which there appears nothing *contra bonos mores*, or really *contra libertatem matrimonii*.

The Lord Ordinary reported the cause. The Court were unanimously of opinion, that the condition ought not to be effectual, as being *contra libertatem matrimonii*; for that the children having a natural right, and the father having defined what he considered as a reasonable provision, this was not to be defeated by the adjecting of an unreasonable condition.

It was also considered as a circumstance of importance, that the codicil was not communicated to the daughter before the marriage. But little stress was laid upon the *misnomer* above mentioned, though founded on by the pursuers.

The Lords reduced the codicil.

Reporter, *Lord Dreghorn*.
Clerk, *Home*.

A& M. Ross.

Alt. Abercromby.

S.

N^o CCVI.

February 8. 1792.

The CREDITORS of SIR ROBERT MAXWELL,

A G A I N S T

TRUSTEES of PATRICK HERON.

CAUTIONER.—*One of two cautioners, paying on an assignment, intitled to be ranked on the estate of his co-cautioner for the whole sums due, to the effect of his recovering a rateable part of the debt.*

SIR ROBERT MAXWELL of Orchardtown, Mr Heron of Heron, and Mr Maxwell of Cargen, were jointly bound for large sums of money. But Mr Maxwell was truly the debtor, the other two having interposed as cautioners for him.

Mr Maxwell became insolvent, and soon after Sir Robert Maxwell conveyed his lands to a trustee for the benefit of his creditors. Upon a sale, a very great deficiency appeared.

In the mean while, Mr Heron having been obliged to pay the whole debts, obtained an assignment in the name of Sir William Forbes and Company, as his trustees. In virtue thereof he claimed to be ranked on the proceeds of Sir Robert Maxwell's lands, for the whole sums paid by him, to the effect of his recovering a full moiety of these sums. This was opposed by the other creditors of Sir Robert Maxwell, who

Pleaded: In a question with the creditor, every co-obligant is debtor to the full amount of the debt. And therefore the creditor is at liberty to attach their respective estates to that extent. Care only is to be taken, that he shall not on the whole receive more than is truly due to him.

But in a question between the co-obligants themselves, each of them is debtor only in his due proportion of the debt; and this proportion cannot be encreased, directly or indirectly, by any operation of the creditor, or of the co-obligants; Tait *contra* the creditors of Macghie, 20th November 1785.

In some cases, it is true, a creditor may be ranked for more than is due to him at the time. Thus a creditor, after a sequestration, might, by the bankrupt statute of 1783, be ranked for the whole sums due at the date of the sequestration, although he had afterwards recovered a part from collateral securities; but that could only be done where the bankrupt might have been sued for the whole; a

proceeding inadmissible with regard to a co-cautioner. And in no instance could the claim be increased after the sequestration, which, however would happen if one of two co-cautioners, who, during the solvency of the other, could only insist for a proportional relief, were to be permitted, in consequence of a bankruptcy, to demand payment of the whole.

A cautioner, after the bankruptcy of his co-obligant, cannot enlarge his claim of relief more than an ordinary creditor can enlarge his claim of debt. And were it allowed to all the creditors, the only consequence would be a nominal increase of the debts while the fund of division remained the same. Nor could the assignment from the creditor put the cautioner in a different situation; this being only done to facilitate the claim of relief, so far as it is authorized by law.

Neither can the particular form in which the cautioners interposed their security by the granting of joint bonds, affect the present question. The creditor was thus authorized immediately to attach the estates of each *correi* for the whole sums due to him; but the interests of third parties were not thereby in the smallest degree encroached upon; and, on recovering his payment out of any particular estate, the law would imply an assignment to the creditors at large, to the effect of their obtaining from the funds of the other debtors a corresponding relief.

Answered: A creditor in a joint bond may attach and be ranked on the effects of every one of the *correi*, to the effect of recovering what is due to him. This is not and cannot be disputed. The next object of the law, after the creditor has thus received payment, is to divide the loss equally among the different co-obligants. And for this purpose the creditor is bound to do every thing that is in his power, although third parties may suffer a consequential loss.

If the effects of the co-obligants, all of them being insolvent, were to be distributed at the same time, the creditor ought certainly to rank on the different estates, so as to draw from each a rateable proportion of the debt. And thus, it is evident, that in the present case the creditors in the joint bonds must have been ranked on Sir Robert Maxwell's estate for the whole debt, this being necessary for equalizing the loss.

Again: Supposing that one of the co-obligants is bankrupt, and the other in good credit, if it were convenient for the creditor to delay his claim till the proceeds of the bankrupt-estate came to be divided, the same thing ought to be done. And thus, as in the former case, the obligations of the parties, agreeably to their true meaning, would have a like effect as to all. But surely, although the creditor may find it necessary to ask his money sooner, that circumstance cannot, in the eye of justice, be considered to vary the rights of the parties.

And it is of no consequence, that if all the co-obligants had continued solvent, one of them, having paid the debt, could only sue his co-cautioner for one half. After a bankruptcy, the question is not to what extent the cautioner shall be ranked, but what he is to draw. And if the creditor, by ranking on the estate of the bankrupt

rupt cautioner for the whole debt, could have placed the solvent cautioner in the same situation, as if both had been alike able to fulfil their engagements, it is just that in virtue of the assignment from him, the solvent cautioner, after paying the debt, should be allowed to rank as he might have done.

The Court were unanimously of opinion, That in the circumstances of this case, where, before any payment, a trust-right had been executed by the insolvent cautioner, and where he that continued in good circumstances, had obtained an assignment from the creditor, the ranking ought to go on in the same manner as if no payment had been made.

The Lords found, " That the trustee for the creditors of Sir Robert Maxwell was bound to rank Patrick Heron, and Sir William Forbes and Company as trustees for him, upon Sir Robert Maxwell's funds for the whole sums due on those debts in which Mr Heron and Sir Robert Maxwell were jointly bound along with Mr Maxwell of Cargen ; but under this condition, that in consequence of their being so ranked, they shall not draw more than one half of the said debts."

A reclaiming petition for the creditors of Sir Robert Maxwell was refused, without answers.

Lord *President* Reporter, instead of Lord *Gardenston*. For Sir William Forbes and Co.
Solicitor-General, *Macconochie*, *Alt. Rolland, Abercromby, Honyman.* *Home*, Clerk.

C.

Nº CCVII.

N^o CCVII.

February 14. 1792.

The YORK-BUILDINGS COMPANY,

A G A I N S T

RICHARD CHESWELL, and others.

PREScription.—*The Scottish prescriptions not pleadable by debtors domiciled in England.*

IN the ranking of the creditors of the York-buildings Company, claims having been made by Cheswell and others, upon bonds granted by the Company, on which *no document had been taken* for upwards of *forty* years, prescription was objected by the Company.

The very same question formerly occurred between different classes of the creditors, when it underwent a very complete discussion, both in writing and in a hearing in presence. The Court then *sustained* the objection; Fac. Col. 9th March 1786, York-buildings Company *contra* Delvalle. That judgement, however, was reversed, on appeal to the House of Lords; but the reversal was attended with this peculiarity, that the objectors not appearing in that high Court, the proceedings took place *ex parte*.

In the present case there did not seem to be any material addition made, to the arguments stated in the former one; and to these it is therefore sufficient to refer. But the Court now viewed the question in a different light. It was

Observed on the Bench: This is in all respects an English company; domiciled in England, and by their charter of erection fixed down to a residence there; so that in every instance of their being sued in this country, citation at the pier and shore of Leith was necessary. If, instead of being thus permanent in England, they had changed their place of residence to Scotland, and had continued here during the *forty* years, it might have been competent to them to plead our prescription, notwithstanding that England was the *locus contractus*. For it is the *lex domicilii debitoris*, which in this matter is the governing rule; and that law admits not this prescription. It is clear, that in England action on those bonds would lie against the Company. They are not therefore, in the words of the statute of 1469, “obligations of nane avail.” The debtors surely would not be intitled to say so, for having

Feb. 1792.

COURT OF SESSION.

437

ving brought their effects over the border. In all cases in which the Court has sustained our prescriptions against English debts, the debtors were considered as having acquired a residence in this country.

The Lords therefore, having advised the cause on memorials, by a great majority repelled the objection of prescription.

For the Company, *Montgomery et alii.*

Alt. *Maconochie et alii.*

Clerk, *Colquhoun.*

S.

N^o CCVIII.

February 17. 1792.

GEORGE GORDON FALCONER, and his Factor *loco Tutoris*,

A G A I N S T

KATHARINE THOMSON.

FACTOR *loco tutoris*—may enter into a submission.

KATHARINE THOMSON had acted for many years as housekeeper for the deceased Mr Falconer of Phefdo. She also uplifted his rents as his factor, and superintended the cultivation of a farm belonging to him.

After Mr Falconer's death, the nearest relation of his heir refusing to be tutor, a factor *loco tutoris* was named, between whom and Mrs Thomson a settlement of accounts took place. But some of the articles being doubtful, amounting in value to about L. 300, a reference was made to two men, with a power to name an oversman. And the arbiters having differed, the oversman gave an award, finding a certain sum due to Mrs Thomson.

Another person having been afterwards named factor *loco tutoris*, he brought an action for setting aside the reference and award, as unauthorized by the situation of the parties. The pursuers

Pleaded: A reference to arbiters is not an act of *administration*, but the exercise of a right of *property*, which is only competent to the owner, or those to whom the owner has specially intrusted it.

The nomination of a judicial factor is a *remedium extraordinarium*, to be applied for preventing wrong, which would be otherwise un-

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avoidable,

avoidable, and not for performing acts which may be done or omitted without essential loss; and least of all, such as may be attended with irreparable injury.

A tutor being appointed to supply the defect of will in the person, as well as to manage the affairs of the pupil, has very extensive powers; but even he cannot enter into a reference respecting a real estate; and a curator has no such power. A factor *loco tutoris*, who is only named to prevent dilapidation, until the tutor-at-law can conveniently undertake the office, neither has nor ought to have such authority. As he cannot directly make any settlement, which may not be controlled by the pupil, he cannot indirectly do so, by the nomination of an arbiter.

In practice, a factor *loco tutoris* has not been allowed to submit to arbiters; although, where the award was favourable to the pupil, it has been found, that the other party was barred from objecting to it; 15th June 1758, Brown; 8th July 1778, Creditors of Macdowal.

Answered: A tutor, both by the Scots and Civil law, may enter into a reference, at least respecting moveable effects. It is essentially necessary for the interest of the pupil, that his guardian should have such a power. It often happens, that the matter in dispute cannot be ascertained in a judicial way without much loss. Such is a settlement of accounts. If, by allowing a decree to become final, the tutor might irrevocably bind his ward, why may he not, in the form of a submission, do the same thing?

A factor *loco tutoris* is now named, altogether to supply the nomination of a tutor by the father, or the assistance of the nearest relation on the father's side, who does not chuse, or is unable to act as tutor-at-law. Whatever powers, therefore, are usually and necessarily intrusted to the one, ought to be given to the other. Without this, the remedy would be incomplete. The decision in the case of Brown is in favour of this argument, for the reference must be binding on both parties, or on neither. In the other case, the question was as to the powers of factor on a sequestrated estate, which were admitted to be quite different from those intrusted to a factor *loco tutoris*. The circumstances attending that case too were very peculiar.

The Court in general thought, that a factor *loco tutoris* might enter into a reference; although, it was observed, that if the question was not the proper subject of such an agreement, or if an improper person had been chosen arbiter, the pupil might be restored *ex capite lésionis*.

The Lords found, that a factor *loco tutoris* might enter into a reference, and therefore in this case assolizied.

Reporter, Lord Dreghorn.

A&T. Dean of Faculty.

Alt. M. Refs.

Clerk, Menzies.

C.

N° CCIX.

No CCIX.

February 27. 1792.

ALEXANDER GRANT,

A G A I N S T

JOHN HILL.

ARRESTMENT.—*Act 1581. c. 18. No action on this statute for breach of arrestment ultra valorem.*

GRANT being a creditor of Alexander Rodger, to whom Hill succeeded as tenant in a farm, used arrestment against Hill, of a hay-stack which Rodger had left on the ground. Hill notwithstanding having allowed the hay to be carried off, Grant raised against him an action on the statute of 1581, concluding in his libel, for payment of his whole debt, and for the farther application of the statute; the debt amounting to upwards of L. 700, and the value of the hay being L. 30.

Grant having obtained decree in absence, Hill brought it under review in a process of suspension, on various grounds, such as, that he was not the custodier of the hay; but what chiefly occupied the attention of the Court was the objection, that at all events Hill could not be liable *ultra valorem* of the subject arrested.

The charger insisted on the authority of the following words of Lord Stair, with respect to *breakers of arrestment*, "That the party injured shall be first paid of his debt and damages, for which he shall have ready execution against the injurer," b. 1. tit. 9. § 29. To which the suspender opposed a passage of Mr Erskine, who, speaking of an arrestee acting in contempt of the diligence, says, "He may be condemned to pay the whole debt a *second time* to the arrester," by which the debt originally due by himself appears to be meant, b. 3. tit. 6. § 14.

The Lord Ordinary at first pronounced this interlocutor: "Finds, "That by the law of Scotland, a person who commits breach of arrestment, does thereby subject himself in payment of the whole debt contained in the decree or horning on which the arrestment was used, although the value of the subject arrested be much less; "and that the law, as to this particular, is not more severe, or less reasonably so, than in cases of escape from prison." But his Lordship afterwards took the cause to report on informations.

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The Court were clearly of opinion, That by a just interpretation of the statute, the contravener could be liable no farther than *in valorem*; and it was observed, that not only Lord Stair, but all the writers, not excepting Mr Erskine, had expressed themselves somewhat inaccurately on this subject.

It was farther observed, that there was an obvious distinction between a case of this kind, and that of escape from prison; for in the one the amount of the loss resulting to the creditor may be easily known; but with regard to the other, it might be impossible to tell what exertions in the debtor *squalor carceris* could produce.

The Lords found, that no action lay on the statute *ultra valorem*.

Reporter, Lord Dreghorn.
Clerk, Menzies.

A&C. Cullen, J. Grant.

Alt. Dean of Faculty, Baillie.

S.

N^o CCX.

May 18. 1792.

ANN STEWART,

AGAINST

SOPHIA HOOME.

PERSONAL AND REAL.—TERCE—*How far excluded by the husband's debts declared to be burdens on the heir, and appointed to be ingrossed in the infeftments.*

FOREIGNER.—*How far a subject of the American States such.*

DAVID HOOME STEWART of Argaty, by a deed of entail, in 1768, disposed to George Stewart his brother, residing at Anapolis in Maryland, and to a series of substitutes, his lands, under "the following conditions, appointed to be ingrossed in the infeftments to follow thereon; viz. That the said George Stewart, and his heirs, shall be burdened with and obliged to pay the whole just and lawful debts that shall happen to be resting and owing by me at the time of my death, in so far as the same shall not be paid out of
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“ my moveable subjects, and also to pay an annuity of L. 25, provided by me to each of Janet and Jane Stewarts, my sisters, during their joint lives after my decease, and L. 35 to the survivor of them, and likewise to pay L. 500 to James Stewart, my younger brother.”

George Stewart succeeded, and made up titles under this deed. After his death, Ann Stewart, his widow, having claimed from Sophia Home, his grand-daughter, then in the right of the estate, a terce out of the lands in which he died infest, it was objected, That the estate having been settled on her husband and the other heirs, under the burden of the provisions granted and debts contracted by the entailer, these burdens must have the effect at least of limiting her claim. In support of it, the

Pleaded: Where lands are disposed as burdened with debts or particular sums of money, such debts or sums are considered to be real *liens*; but where the disponent or heir is only taken bound to pay, they remain personal.

Thus, “ a purchaser of lands having obliged himself to pay a certain sum to any person his author should please to nominate, this clause, *though in the infestment*, was found not real to affect singular successors;” Stair, 25th June 1664, Canham *contra* Adamson. So also, Fountainhall, 19th November 1685, Lord Ballenden; Ibid. 14th June 1687; Home, July 1787, Creditors of Marjoribanks; Dict. vol. 1. *voc.* Personal and Real; Fac. Coll. 19th July 1780, Allan *contra* Creditors of Cameron.

Now, by the clause mentioned above, the burdens in question, tho’ *appointed to be ingrossed in the infestments*, being laid, not on the lands, but on the heirs, are therefore merely personal. As it is clear they could afford no ground of competition with purchasers or real creditors secured by infestment, so they can as little affect the claim of terce, which, as it is founded on the husband’s seisin, can only be made to yield to rights preferable to it.

Answered: It has been frequently decided, that if a disposition of lands be granted under the burden of the payment of the granter’s debts, these are constituted real *liens* on the subjects; Dict. *voce* Personal and Real; July 1719, Creditors of Coxston; 18th February 1729, Geddies; 10th January 1738, Creditors of Smith. Also the case of the Creditors of Marjoribanks, quoted on the other side.

As to the rest of the cases appealed to by the opposite party; in those of Canham and of Ballenden, the conveyances were not granted under that burden, the disponents being only taken personally bound to pay certain sums. And the same observation applies likewise to the case of Cameron’s Creditors.

The deed in question having been in like manner granted under the burden of certain debts, for it bears to be executed “ under the provisions and conditions after expressed,” they are rendered real *liens* on the lands, effectual even against the claims of real creditors,

much more that of terce, which has been erroneously compared to these.

It resembles more the right of an adjudger or appriiser, who, as Mr Erskine says, "when he uses diligence consults no records, but affects "the subject appriised *tantum et tale* as it was vested in his debtor;" b. 2. tit. 12. § 36.; an opinion recognised by the Court in the case of Thomson, where it was found, "That the allegation of fraud was not "relevant against heritable securities and infeftments, but that it "was relevant as to creditors-adjudgers;" Fac. Coll. 15th November 1786. Being during the husband's lifetime subject to his power of disposal, it vests in the widow on his death, by the *kenning* or adjudication of the inquest, *tantum et tale* as the right out of which it arises "was vested in him."

The Lord Ordinary found, "That whatever annuities or debts upon the lands, of any kind, are mentioned in the deed of entail, as "a burden upon the estate entailed, must in so far restrict the claim "of terce, which the Lord Ordinary found must be only exigible "from heritable subjects in which her husband died infeft, after deducing all burdens above mentioned."

The Court were clearly of opinion, that by the conception of the deed, the burdens were personal on the heir, and not real on the lands. Some attention was paid to the argument of *tantum et tale*, as in some degree countenanced by an opinion that seemed once to obtain, but which, it was observed, was now corrected by the decision in the case of the Creditors of Kerse*.

The Lords therefore repelled the objection.

The widow being a native and an inhabitant of America, it was farther objected, That as a subject of the United States, owing no allegiance to Britain, she was to be deemed an alien, and so to be excluded from a claim of terce as much as from a claim of property.

The Lord Ordinary found, "That the claimant having been born "in America while that country was subject to Great Britain, is "not to be considered as an alien, but as a subject of Great Britain, "residing now in a foreign country; therefore repels the objection of "alienage to the claim of terce." In this judgement the objector acquiesced.

Lord Ordinary, *Monboddo*.
Clerk, *Colquhoun*.

For the Widow, *Wight*.

Alt. *Macleod-Bannatyne*.

S.

* *Supra*, p. 421.

N^o CCXI.

May 23. 1792.

WILLIAM HENRY RALSTON,

A G A I N S T

JOHN LAMONT.

BILL OF EXCHANGE.—PRESCRIPTION.—*The sexennial limitation of bills does not affect the claim of recourse competent to the acceptor of a bill against the drawer.*

IN an action of multiple-poiniding, brought for authorising the distribution of effects which had belonged to a person deceased, Lamont claimed as a creditor, in consequence of his having honoured two draughts by the deceased upon him; the one dated in 1778, and the other in 1779.

Ralston, a competing creditor, objected to this claim, as cut off by the sexennial limitation of 12th Geo. III. cap. 72; and, in support of the objection,

Pleaded: The enactment in general provides, that no bill of exchange, or inland bill, shall be effectual to produce action, unless within six years from the term of payment; and it is of no consequence whether the action is to be brought by the drawer against the acceptor, or by the holder against the drawer, acceptor, or indorsers, or by the acceptor against the drawer, for his relief. This seems no less evident from the words of the enactment than from its object, which clearly was to limit all obligations arising from transactions of this sort, within such a short period as was suitable to their nature and general use.

Answered: The actions precluded by the statute are those which naturally arise out of the bills, and in which the pursuers rest upon these documents as the sole foundation of their claim. Such are those brought by the drawer or holder against the acceptor for payment, or by the holder against the drawer or indorsers, for recourse. The present case is of a quite different nature, the production of the bill being only useful as a circumstance of evidence. The obligation itself, or the right of action, arises from the advance of the money, which may be proved in many different ways.

The Lord Ordinary repelled the objection.

In

In a reclaiming petition, besides the argument on the statutory limitation, it was contended, that the bills having been accepted in general terms, a presumption arose, that at the time the acceptor had in his hands effects belonging to the drawer. That presumption, however, appeared to be sufficiently obviated by the circumstances of the case.

After advising the reclaiming petition, with answers,

The Lords adhered to the Lord Ordinary's interlocutor.

Ordinary, *Lord Justice-Clerk*. For Ralston, *Montgomery*. For Lamont, *Macleod-Bannatyne*. Clerk, *Menzies*.

C.

N° CCXII.

May 23. 1792.

JAMES RUSSEL,

AGAINST

JAMES FAIRIE.

BILL OF EXCHANGE—PRESCRIPTION.—*The sexennial limitation of bills, how far affected by relative writings during the six years, or afterwards.*

FAIRIE, on 8th May 1782, granted to the mother of Russel a bill of exchange for L. 92, payable one year after date.

On the bill were marked a variety of partial payments, the latest dated in September 1788. Three of the markings were in Fairie's hand-writing; the last of these, however, was in 1786.

After Mrs Russel's death, there having been many transactions between her and Fairie, a correspondence took place between him and her son. In March 1789, Fairie desired Russel "to send a copy of the bill, and the payments made on the back of it, so that he might settle the balance." And in July 1789, after the expiration of the *six years*, he again wrote in similar terms.

At

At last an action was brought by Ruffel against Fairie, for the sums appearing to be due, after deduction of the partial payments as marked on the bill.

The defender alledged, that he had made other advances to the full amount, trusting that the creditor would have carefully noted them. At any rate, he contended, that the bill was no longer a probative document, being cut off by the sexennial limitation of 12th George III. cap. 72.

In support of the action, Ruffel

Pleaded: The purpose of the enactment in 1772, was to introduce, with regard to bills of exchange, &c. the sexennial limitation of England; it being very expedient, that, in commercial transactions, the law should be the same in all parts of the kingdom. As in England, therefore, any writing, even within the six years, which recognizes a bill as the voucher of a subsisting debt, is held to interrupt the currency of the prescription, the same rule ought now to be observed in this country. In particular, the marking of partial payments, in the hand-writing of the debtor, saves from the limitation; Douglas's Reports, p. 629, Whitecomb *contra* Whiting. And after the lapse of the six years, the most imperfect and general acknowledgement, such as that of an executor giving public notice of his intention to pay what his predecessor owed, has been held sufficient for that purpose; Chancery Reports, p. 385.

Even upon the footing of the shorter prescriptions known in Scotland, the circumstances in this case are more than sufficient to support the claim. It is true, that partial payments, when noted by the creditor, can have no weight. But where this is done by the debtor himself, it amounts to a clear acknowledgement of his obligation; and as the enactment of 1772, allowing the subsistence of the debt to be proved, after the six years, by the writing as well as by the oath of the party, does not say in what form the writing should be, or whether the date of it should be before or after the lapse of the six years; even the markings on the bill would, in this case, be *per se* sufficient to make room for the statutory exception. But the correspondence, after the expiration of the six years, in which a balance is admitted, and a reference made to the partial payments noted on the bill, for the amount of it, seems to put the question beyond the possibility of doubt.

Answered: In the enactment of 1772, there is no express adoption of the English law, and the rules it lays down are quite inconsistent with any intention of that kind. The sexennial limitation of England is not directed against the bill only as a legal voucher; it is an extinction of the debt itself; inasmuch, that it cannot be afterwards proved by the oath of the party, which, however, is authorized with us by the late statute. It would therefore be incompetent, although it were for the evident advantage of the country, to substitute in this respect the law of England in the place of our own. Besides, it is far from being clear that we would derive any advantage from the alteration. Those circumstances particularly, which in England are admitted even after the six years to save from prescription,

seem to be altogether inadequate and inconclusive. From thence it would follow, that the obligation to pay the testator's debts, imposed in all testamentary deeds, should revive every claim to which he might have successfully opposed the statutory limitation.

The enactment in question was evidently intended to establish, with regard to bills and other vouchers of the same nature, one of the shorter prescriptions known in Scotland. These are founded on a presumption of payment, which, so far from being removed by such transactions as here occurred within the six years, is held to receive from thence additional force; Erskine, 3. 7. 39. And although extreme cases might be figured, in which the consequences may be thought hardly reconcileable to justice; for example, where, on the day before the lapse of the six years, the debtor marks a payment to the account of the bill, or perhaps of the interest due on it; this cannot derogate from the efficacy of a law, in general wisely calculated for the security of commercial intercourse.

No relative writings, therefore, during the six years, are admitted in practice to remove the prescription, because they are not absolutely incompatible with the legal presumption of payment on which it rests. As to writings after the six years, where they amount to an unqualified admission of a subsisting debt, every attention ought to be paid to them. But those referred to on the other side are not of that nature. They indicate a wish to settle the claim arising from the bill, as well as all other transactions occurring between the parties. But they do not necessarily imply, that a balance was due by the defender, more than by the pursuer; and therefore they cannot, in sound construction, be held as a proof, such as is required by the statute, "by the oath or writing of the party," that the debt contained in the bill "is resting owing;" Fac. Coll. February 3. 1784. Scot *contra* Gray; January 31. 1787, Buchan *contra* the Creditors of Bedlay.

The Lord Ordinary pronounced this interlocutor:

"In respect it has been decided by the Court, that receipts for partial payments within the six years do not bar the sexennial prescription of bills, when pleaded against an action brought on a bill after the elapse of the said six years; and also in respect that the defender's missive letters produced by the pursuer in this action, founded on the bill libelled, do not, in terms of the statute, prove the debt as libelled, or that the same is resting owing," assolzie the defender, &c.

A reclaiming petition was preferred, which was followed with answers.

A majority of the Court were of opinion, that the enactment of 1772 was of a similar nature with those introducing the shorter prescriptions of Scotland, and not an adoption of the English law with regard to the limitation of bills, &c.; and that neither the markings in the hand-writing of the defender, nor the relative correspondence

May 1792.

COURT OF SESSION.

447

dence within the fix years, could save from the currency of prescription.

But the Lords found, " That the letter in process, dated 22d July 1789, from the defender to the pursuer, after the sexennial prescription had run, does instruct, that the debt libelled was then resting and owing in part; and therefore repelled the defence of the sexennial prescription."

Ordinary, Lord E/sgrove.
Clerk Menzies.

Ast. Maconochie.

Alt. Armstrong.

C.

A doubt was started by one of the Judges, whether an interruption of the sexennial prescription by writing, was to be considered as a renewal of the voucher, so as to make room for a new course of the same prescription, to be reckoned from the date of the interruption, as was found in the case of the septennial limitation of cautionary engagements, Dalrymple, N^o 131; or whether the operation of the statute being thus completely done away, the bill would subsist as a legal instrument for forty years, unless, from the circumstances of the case, there arose a presumption of payment. But it was not necessary to determine the point.

N^o CCXIII.

June 2. 1792.

GEORGE BROWN,

AGAINST

ROBERT COVENTRY.

SUBSTITUTE AND CONDITIONAL INSTITUTE.—*Substitution of heirs may take place in moveables, but not to be admitted without express words.*

DAVID BARCLAY executed a deed of settlement in favour of Coventry, as his executor and universal disponee; under the burden " of making payment of a sum of money to Rachael Barclay in liferent, for her liferent-use only, and to the heirs of her body in fee;
" whom

“ *whom failing*, to the said Robert Coventry, his heirs, executors, and assignees.”

Rachael Barclay enjoyed this liferent some years; but dying after having been married, she left an infant daughter; her husband, Brown, also surviving. As administrator-in-law for the infant, he sued Coventry, the executor, for payment, and obtained decree; but before the money was paid, the infant died. Brown now demanded it as the executor of his child, and having *expede* a confirmation, raised an action against Coventry; who objected, that the right of the legacy had devolved to himself as substitute by the above-mentioned deed. In support of this defence, the latter

Pleaded: The words “whom failing” have long been understood to comprehend both *conditional institution* and *substitution*. Dict. *voc.* Subst. and Cond. Instit. v. 1. p. 395.

In the present instance they must have imported *substitution*, as *institution* was unnecessary, where the right of the legacy, if lapsed, would at any rate fall to the defender as general disponent.

Our law does not, like the Roman, admit only *substitutio pupillaris*, (of which substitution the present case indeed is an example); but in all cases it allows the ordering of succession by substitution. Above a century ago, substitutions in legacies were found to be effectual; Stair, 13th July 1681, Christie *contra* Christie. Also 12th June 1740, Campbell *contra* Campbell; Kilker. *voc.* Substit.; Kames, Rem. Dec.; Stewart’s Anf. p. 283.; Ersk. b. 3. tit. 8. § 44. The late decision, Stevenson’s Trustees *contra* Graham, has been erroneously supposed of a contrary tendency; it being founded on special words, excluding accretion or substitution after the term of payment*.

The substitution here, it is true, being a mere destination, if the child had lived to the age of majority and then disposed of the money otherwise, the defender’s right would have been defeated; or had she even uplifted it, after attaining to years of discretion, there might have been a doubt, whether that did not imply a change of the substitution. But she having died in infancy, there could be no alteration by her, either express or tacit.

Nor would it have been a circumstance of any importance, though the money had been paid in the child’s lifetime; for money exacted by a tutor or administrator-in-law, can never evacuate a substitution, or make any alteration upon the pupil’s succession. Dict. vol. 1. *voc.* Minor, p. 577; *ibid.* vol. 2. *voc.* Tutor and Pupil, p. 490; Stair, 23d February 1663, Aikenhead; Ersk. b. 1. tit. 7. § 18. 33.

Answered: It should seem that things of a permanent nature alone were the proper subject of substitutions or tailzied succession; not sums of money, or debts, which are liable to continual changes.

If a debt due by bond, containing substitutions, have been paid to the creditor or institute, what sort of a title, on his death, should the substitute make up? The bond being cancelled, and the debt extinguished, he could not serve heir of provision under the one, or establish a title to the other, when both had ceased to exist. Neither

* 9th February 1790, not collected.

could he have any claim against the heir, his right being but a *spes successionis*, and not a *jus crediti*.

It seems to have been admitted, that upon the money being paid to the institute, at least when capable of will, the substitution is vacated. Now, as this cannot proceed from any presumption of intention, founded on the circumstance of his receiving the payment, which may often be contingent or even involuntary, the inference is plain, that it must take place on the arrival of the term of payment. In regard to the argument of the conditional institution of the defender being nugatory, as he was the general dispositive; the rule applies, *Superflua non nocent*.

That our more ancient law disallowed tailzied succession in the case of sums of money, has not been denied. As to the decision *Christie contra Christie*, it was disapproved of unanimously by the Court on a latter occasion; *Kilkerr. sup. cit.*; and that of Campbell related not to a legacy, but to a general disposition. Lord Dirleton's opinion is clear against substitutions in legacies; *Tit. Substitut. in legacies*. See also Bankton, vol. 2. p. 388. § 44. *Stevenson's Trustees contra Graham*, 9th February 1790.

As the money ought to have been previously paid by the defender, this is equivalent to actual payment; *l. 161. ff. De reg. jur.*; *Ersk. b. 3. t. 3. § 85*. Nor is it necessary to notice the defender's argument on this head, which takes it for granted, that the substitution was to take place even after the term of payment.

The Lord Ordinary repelled the defence.

A reclaiming petition having been presented, and followed with answers, the Court appointed a hearing in presence.

On advising the cause, their Lordships were unanimously of opinion, that tailzied succession might take place in legacies of moveables, in which case service as heir of provision would be necessary; that these, however, not being naturally the subject of such a destination, this was not to be presumed *in dubio*, and that in the present case the testator's intention was to be held to have been that of creating a conditional institution, and not a substitution.

The Lords therefore adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Justice-Clerk*.

A&T. Rolland.

Alt. M. Ross.

Clerk, Sinclair.

S.

N^o CCXIV.

June 6. 1792.

THOMAS ELLIOT OGILVIE,

A G A I N S T

SIR JOHN SCOT.

TEINDS.—*The grant of a patronage cum decimis rectoriis et vicariis, before 1690, gives a right to the titularity of the tithes.*

A N action was brought by Mr Ogilvie, for a valuation, and also for a sale of the tithes of his lands, in the parish of Ancrum.

In this action Sir John Scot produced charters from the Crown before the year 1790, in favour of his predecessors, containing the following grant. “*Una cum advocacione, donatione, et jure patronatus ecclesie sue et parochie de Ancrum, decimis rectoriis et vicariis ejusdem,*” &c. And hence he contended, that he was titular of the tithes as well as patron of the church of Ancrum, and so intitled to *nine* instead of *six* years purchase.

In opposition to this demand, Mr Ogilvie

Pleaded: Anciently a patron had not only the right of presenting the parochial incumbent, but a patrimonial interest in the tithes. Hence it became usual to frame rights of patronage in the terms here employed, the teinds being conveyed as well as the patronage. Still, however, the former have been considered merely as accessory to the latter, as was determined, January 4. 1749, Marquis of Annandale, Kilkerran, Falconer.

It is true, that a decision apparently different was given June 20. 1753, Spalding; but beside the circumstances which in that case tended to show, that something more than a right of patronage was intended, the words of the grant were much more comprehensive than in the present case, the right of patronage being given “*cum decimis,*” which seemed to indicate a conveyance of the tithes, altogether separate from and independent of the right of patronage.

A subsequent determination, January . 1762, Blair *contra* Bryce Ker, proceeded on similar grounds, Mr Blair’s title-deeds not only giving him a right of patronage, and also the glebe, manse, and tithes of the parish, but containing a separate *Reddendo* for these last rights.

Answered: Where a right of patronage only is intended, there is no occasion for mentioning tithes; because, so far as the patron is intitled

titled to interpose in the administration of them, this must follow from a grant of the patronage itself. Wherever, therefore, along with a right of patronage, tithes are particularly conveyed, the just presumption is, that the grantee was to have a right of titularity as well as of patronage. But where the tithes are conveyed, as in this case, it seems scarcely possible to doubt the intention of the grant. If such an interest in the tithes only was meant, as is merely collateral and incident to a right of patronage, the grant must have been in such terms as these, "*Cum advocacione parochiæ, et decimarum*," whereas the words "*Cum advocacione, decimis*," &c. or "*Cum decimis*," these two expressions being precisely of the same import, clearly denote a right of tithes distinct from the patronage. The latest decisions are agreeable to this reasoning; while, in the only one that can be founded on by the opposite party, the point, as appears from looking into the printed papers, seems to have undergone little or no discussion.

The Lords unanimously found, That Sir John Scot was titular as well as patron, and therefore intitled to *nine* years purchase of the tithes.

A&T. *Wight.*Alt. *Tait.*

C.

N^o CCXV.

June 6. 1792.

ROBERT BANKS, and others.

A G A I N S T

HENRY JAFFRAY, and others.

BURGH ROYAL.—*Consequences of omitting or refusing, in a proper manner, to take the oaths to Government, as an officer in a Royal Burgh.*

JOHN HEWIT was chosen deacon of the corporation of tailors in the burgh of Stirling in the month of September 1790; but he did not take his seat, or act in that capacity, till 27th September 1791, when the magistrates and other officers in the burgh were elected for the ensuing year.

The

The usual oaths to Government being tendered to him, Hewit added this qualification, "that he took them, so far as was agreeable to the word of God."

The result of the election depending on this man's vote, a complaint was preferred, in virtue of 16th George II. for trying its validity.

Thereafter, on 24th December 1791, Hewit appeared in the Court of Session, and took and subscribed the oaths, without any reservation.

The Court unanimously found, "That the oaths had not been taken by Hewit on 27th September 1791, in the form required by law." After this, however, the question occurred, what should be the effect of the vote he had given; Henry Jaffray, and the other candidates favoured by him, insisting that the circumstances occurring at that period could not affect them. In support of this proposition, they

Pleaded: The Scots statutes of 1661. c. 11. and 1685. c. 17. though they impose certain penalties on persons refusing or delaying to take the requisite oaths to Government, do not render void what is done by them in their official capacity. And the act 1693. c. 6. declaring that such persons shall be *ipso facto* deprived of their offices, is alike silent on that point. These statutes, however, having become inapplicable by the union of the two kingdoms, are no longer in force.

By act 6th Ann. c. 14. new oaths were required, and the persons who do not comply are declared incapable to hold the offices in respect of which the oaths were imposed, and the offices are declared to be *null* and *void*. But the idea of an immediate forfeiture, without some judicial discussion, as it is inconsistent with the general practice, is here inadmissible, the party being permitted to take the oaths at any time within three months "after his *admittance* into the office." Thus at least the validity of the acts performed by him during that time must be liable to no exception. Kames's Principles of Equity, book 1. part 1. sect. 2.; 20th February 1787, Campbell *contra* Macdowal.

A subsequent clause in the same statute imposes penalties on those who, after *refusing* or *neglecting* to take the oaths, continue to *execute* their offices; which clearly imports, that even a refusal to take the oaths did not *ipso facto* render the nomination ineffectual. And this is also confirmed by comparing the enactment in question with those respecting bribery and corruption committed by persons holding offices in burghs, where the inefficacy of the votes, and other acts performed by the offenders, is declared in express words. See act 13th 14th Will. III. also 22d Geo. III. c. 41. §. 45.

The statutes too passed at the end of each year, for indemnifying those who have omitted to take the necessary oaths, contain only the limitation, that "they shall not restore or entitle any person or persons to any office, employment, benefice, matter, or thing whatsoever, *actually avoided by judgement of any of his Majesty's courts of record.*"

Farther, The statute of indemnity passed in the year 1791 must put an end to the present argument. For if it shall be held, that it is not
necessary

necessary to take the oaths until the party enters on the exercise of his office, the proceedings on 24th December 1791 must be considered as fully sufficient to remove every objection. If, on the other hand, the obligation to take the oaths commenced as soon as the party was elected, he was thereby enabled, by taking the oaths on or before 25th December 1791, to prevent any forfeiture to which he had become liable in consequence of his former neglect.

Answered: The purpose of requiring certain oaths from persons in offices of public trust, is not surely to make room for pecuniary penalties, but to exclude those who are unwilling to give such assurances of their attachment to the established government. The taking of the oaths, therefore, ought to be considered as a condition annexed to the several offices, in respect of which they are required. And on a survey of the different enactments it will appear, that this was in the view of the legislature, and effectually provided for.

The acts 1661. c. 11. and 1693. c. 6. require the persons therein mentioned to take the oaths, "at their entry and admission to their several offices, and before the exercising thereof." And it is declared, "That if any person shall own or exercise their offices, without taking the oaths, they shall be deprived *ipso facto* of their said offices, trusts, and employments." The act 1702, c. 1. on the same subject, refers to that in 1693, and thus it seems quite clear, that before the union no person could validly exercise any public office without previously taking the oaths to government.

Nor were those enactments done away by the subsequent statutes, which were only meant to adapt the oaths to the circumstances of the times, without altering their nature or effects. The words indeed are somewhat different, but they evidently mean the same thing; the offices held by persons neglecting or omitting to take the oaths, being by the statute itself "adjudged to be *void* and *null*." And to this sanction are added the penalties of the English statutes 13th and 14th William III. which, besides a penalty of L. 500, excludes the offenders from suing in the courts of law; act 6th Ann, c. 14.

By act 1st George I. c. 13. it is in like manner declared, that those who neglect or refuse to take the oaths, "shall be *ipso facto* incapable and disabled in all cases, and to all intents and purposes, to enjoy the same offices or advantages thence arising;" and every office, &c. is "*ipso facto* adjudged *void*."

The acts of indemnity, instead of weakening, tend very much to confirm this argument. Those acts, proceeding on the narrative, that "some persons, from ignorance of law, absence, or some unavoidable accident," have been prevented from taking the oaths to Government, extend only to those who have *omitted*, and not to such as have *wilfully refused* to take them. They also contain an express ratification of the acts and deeds of those who are intitled to the statutory benefit, which denotes, that in every case such acts were invalid. And as to the act 31st Geo. III. although it were to be so construed as to protect a wilful refusal to take the oaths, it is quite inapplicable to the present case, the delinquency in September 1791 being

after the passing of the law, which was only meant as a remission of penalties already incurred, and not to afford impunity to future offenders.

The Court by one interlocutor found, that the elections which had been carried by Hewit's vote were ineffectual and void.

But after advising a reclaiming petition, with answers, the Lords altered that interlocutor, being chiefly moved with this consideration, that as the enactments after the Union authorised the party, at any time within three months *after his admission* into his office, to take the requisite oaths, his actings in the mean time were to be considered as legal, and authoritative in every respect.

With regard to the effect of the acts of indemnity, there was a great diversity of opinion, many of the Judges thinking, that where the party had wilfully refused, as in this case, to take the oaths in a proper manner, he was not intitled to the benefit of these enactments.

“ The Lords repelled the objection to the vote of John Hewit, and
“ dismissed the complaint,” &c.

A reclaiming petition was preferred, and refused without answers.

*A& Solicitor-General, Maconochie, Abercromby.
Clerk, Menzies.*

Alt. Lord Advocate, et alii.

C.

June 1792.

COURT OF SESSION.

455

N^o CCXVI.

June 8. 1792.

JAMES MILLER and his ATTORNIES,

AGAINST

JOHN ALLEN.

FOREIGNER.—*An alien cannot sue, in the courts of this country, as a tutor-at-law or curator for an insane person resident in Scotland.*

MILLER, a subject of the United States of America, as curator-in-law of his brother, a fatuous person, residing in Scotland, brought an action, by his attornies, against Allen, for monies due to his brother.

Allen did not dispute the justice of the debt; but contended, that the pursuer, being an alien, could not be allowed, as a curator-in-law, to uplift sums of money due by and belonging to a person residing here.

The Lords sustained the defences.

Reporter, Lord Henderland.

A&T. Cullen.

Alt. Hay.

Clerk, Menzies.

C.

N^o CCXVII.

June 12. 1792.

JOHN SMITH,

AGAINST

MARION WILSON and others.

HEIR PORTIONER.—**PRÆCIPUUM.**—*What is to be reckoned a mansion-house, so as to intitle the eldest heir-portioner to such a preference.*

JOHNS WILSON, town-clerk of Glasgow, was proprietor of a farm in Dumbartonshire, worth about L. 1600. He had also a house in the town of Glasgow, where he almost constantly resided, valued at L. 1400.

Besides,

Besides, Mr Wilfon had a small tenement, called Muirend, consisting of five or six acres, at the distance of several miles from Glasgow, where he had erected a kind of villa; the grounds, which were surrounded with a high wall, being converted into a garden and shrubbery, &c. and to this place he used to retire in the months of summer, for a day or two, as often as his professional engagements would allow.

Mr Wilfon was also possessed of some moveable effects. At his death, he having no son, John Smith, in the right of his eldest daughter, claimed as a *præcipuum* the property at Muirend. In support of this claim, Smith

Pleaded: The right of the eldest heir-portioner to the chief mansion-house or country residence of the defunct, does not depend on the relative value of it, or of the garden-grounds connected with it. Neither is it of any importance that, as in this case, the messuage is at some distance from the other parts of the landed property which belonged to the ancestor; *Reg. Mag.* 2. 27. 28.; Balfour, p. 223.; Skene, *De verb. sig. voce Eneya*; Hope's Maj. pract. tit. *De Jure nostro de Succes. in lin. rect.*; Craig, 2. 12. 7.; Stair, 3. 5. 11.; Bankt. 3. 5. 83.; Erskine, 3. 8. 5.; June 10. July 21. 1708, Cowies; June . 1743, Carnock; 1742, Peadies; 1750, Chalmers; Nov. 14. 1765, Ireland *contra* Giyan; June 24. 1774, Forbes *contra* Forbes.

Answered: A *præcipuum* can be claimed only where, after the principal messuage or mansion-house has been set apart for the eldest heir-portioner, there is some landed property attached to it, which may be divided among the other co-heirs. Besides, though used as a retreat for a day or two in the summer season, the house in question could not be called the principal messuage or mansion-house of the deceased, whose residence was in the town of Glasgow, where he carried on his business. The consequences of a contrary doctrine would be, to give to the eldest daughter of every petty tradesman or man of business, who may have had a country-house, such a preference over her younger sisters as would be exceedingly unjust, and at the same time quite inconsistent with feudal notions; Du Cange, *voce Messuagium capitale*; Ibid, *voce Præcipuum*; Stair, 3. 5. 11.; Mackenzie, 3. 8. 25.; Bankt. 3. 5. § 5.; Erskine, 3. 8. 13.; Dictionary, November 12. 1696, Hawthorn; January 25. 1748, Wallace; June 24. 1786, Angus*.

The Lord Ordinary found, that in this case the pursuer had no right to a *præcipuum*.

And, after advising a reclaiming petition, with answers,

The Lords unanimously adhered to the Lord Ordinary's interlocutor.

Ordinary, Lord Justice-Clerk.

A& Mat. Refs.

Alt. Craig.

Clerk, Home.

C.

N^o CCXVIII.

* Not collected.

N^o CCXVIII.

June 20. 1792.

GEORGE SPALDING,

A G A I N S T

REBECCA SPALDING and others.

HERITABLE AND MOVEABLE.—*The apparent heir of a person whose lands were sold judicially, transmits to his executors the interests arising from the reversion of the price during his apparency.*

THE lands of Ashintully, in which David Spalding had been infeft, were judicially sold in 1766. As they afforded a considerable reversion, the creditors received what was due to them in virtue of warrants from the Court of Session, and without any decree of division.

Daniel Spalding, the only son of David, being fatuous, never made up titles to the reversion, though he received, by the authority of the Court, some small sums for his subsistence. After his death, in 1788, George Spalding expedite a special service, and was infeft in the lands, as heir of David Spalding. On the other hand, Rebecca Spalding and others, as the nearest in kin to Daniel Spalding, expedite a confirmation, for vesting in them the interests arising out of the reversion during his life.

For ascertaining the effect of these proceedings, an action of multiple-pointhing was brought; when for George Spalding, the heir, it was

Pleaded: The right to the reversion of the price of lands sold judicially unquestionably belongs to the heir of the common debtor, ascertained in the usual form, by special service and infeftment; July 21. 1742, *Stirling contra Cameron*; Dictionary, vol. 3. p. 398. Nor can a distinction be made between one part of the reversion and another.

It is true, that in practice an apparent heir of lands, after the death of his ancestor, is authorised, until his titles are made up, to levy the rents; and it has been lately found, though after much difficulty, that upon his death, even without a service, he transmits to his executors those rents which he might have uplifted. But this privilege cannot be extended to such a case as the present, where the apparent heir had no right to possess, and could not, until a final scheme of division was made out, lay claim to any thing.

On this principle it was found, that an arrestment was an inhabile diligence for attaching any part of the price of lands sold judicially, 30th November 1779, Bland Gardiner. The decision in the case of Carnock, Fac. Col. vol. 1. No. 181, respecting the issues of an heritable bond during an apparenacy, is not contrary to it, the person in that case who was apparent heir to the original creditor, being also intitled to succeed as a *nominatim* substitute. In the subsequent case of Hamilton of Dalziel, the determination seems to have been viewed in that light, December 5. 1760.

Answered: If the common debtor had, till his death, continued in the unrestrained right of the lands, his son, though unentered, would have transmitted to his executors those rents which had accrued during his apparenacy: but the price of the lands, after a judicial sale, is to be considered as a *surrogatum* for the lands; and the rights of the different parties laying claim to the succession, ought, in both cases, to be regulated in the same manner. The sale is truly incomplete till the price is paid; and the case here is to be viewed in the same light as if a part only of the lands had been sold, where undoubtedly, in a competition for the rents of the lands unsold, the executors of the apparent heir would be preferred to the heir of the common debtor.

It is of no consequence in the ordinary case, that the apparent heir has not, during his life, entered into the possession of the lands which belonged to his predecessor, and it ought to be as unimportant here. The want of a decree of division seems as little to affect the present question. Such a decree gives no new right; it is a mode only of ascertaining the situation of the parties; and where there is a surplus, it is seldom or never used, it being sufficient to shew, by discharges from the creditors, that the debts have been fully paid. Indeed it is impossible to distinguish the present case from that of an heritable bond, where, although the debt itself must, as an heritable subject, descend to the heir served and infeft, the arrears have been found to belong to the executors of the apparent heir dying unentered; 24th July 1765, Lord Banff *contra* Joas; Appeal Cases, April 1767, Hamilton *contra* Hamilton of Dalziel.

The Lord Ordinary's interlocutor was in these terms:

“ Finds, that George Spalding, the heir of David Spalding, who
 “ was the last person of this family infeft in the estate of Athintully,
 “ is preferable to the surplus sum, and interest arising from the sale
 “ of the said estate in 1766, after payment of the whole creditors;
 “ and prefers the said George Spalding accordingly,” &c.

But after advising a reclaiming petition, with answers, the Court pronounced this interlocutor:

The Lords find, “ That the petitioners, the executors and next of
 “ kin confirmed to Daniel Spalding, the apparent heir, have right to
 “ the

July 1792.

COURT OF SESSION.

459

“ the interests of the reversion of the price that fell due, and were not
“ uplifted during his life.”

Ordinary, *Lord Ankerville.*
For Rebecca Spalding, *Rolland.*

For George Spalding, *Solicitor-General, Mat. Ross.*
Clerk, *Menzies.*

C.

N^o CCXIX.

July 3. 1792.

TRUSTEES OF GEORGE ROSS,

AGAINST

SARAH AGLIANBY.

WRIT.—*In deeds executed by persons who are blind, with the assistance of notaries, it is necessary that, at the time of executing, they be read over in the hearing of the granters, before the witnesses.*

RICHARD LOWTHIAN, who had amassed a fortune of L. 70,000, died at the age of *ninety*. During the latter years of his life, being afflicted with blindness, he used to employ notaries in the execution of his deeds.

In this manner, in the course of ten years preceding his death, which happened in 1784, he had executed a number of settlements, the last of them dated in 1783, in favour of Sarah Aglianby his wife, to whom he had been married fifty years. The notaries dockets, it is to be remarked, without mentioning that the deeds were read over to Mr Lowthian, ran in the usual style, thus: “ De mandato
“ prædicti Richardi Lowthian, scribere ut asseruit, nescientis, pennam-
“ que tangentis, nos — — — notarii-publici ac co-notarii, in præ-
“ missis specialiter requisiti, pro illo subscribimus.”

He had no children; and his heirs at law were Ross his nephew, and two nieces. In the name of certain trustees, Ross instituted an action of reduction of those deeds, on various grounds, but chiefly that of an alleged essential defect in the mode of executing them, in consequence of their not being read over at the time; a circumstance which ought not only to have taken place, but should have appeared from the docket. In support of this reason of reduction, it was

Pleaded:

Pleaded: If a person, when possessed of sight, and able to read, subscribe, before witnesses, a deed, though not holograph, or one that is holograph, though not in their presence; the evidence of consent, essential to every deed, will be legal and complete. But if the granter be ignorant of letters, and still more if he be deprived of sight, it will avail little that a deed be produced, as having been executed by notaries at his desire, unless there be evidence afforded, that the deed was read over to him in such a manner that he was able fully to understand it. This is a plain dictate of common sense, and needs no aid from authorities, which, for the same reason, are hardly to be looked for.

In the Roman law, a special provision was made for the security of blind persons executing testaments, by a constitution of the Emperor *Justin*, thus: “ Ut carentes oculis, per nuncupationem suæ condant
“ moderamina voluntatis: scilicet præsentibus testibus: tabulario etiam, ut cunctis ibidem collectis, primum ad se convocatos omnes,
“ ut sine scriptis testentur, edoceant: deinde exprimant nomina specialiter heredum, et dignitates singulorum, et indicia, ne sola nomen
“ minimum commemoratio quicquam ambiguitatis pariat: et ex quantâ parte, vel ex quot uncis in successionem admitti debeant: et quid
“ unumquemque legatum seu fideicommissarium adsequi velint: omnia denique palam edicant quæ ultimarum capit dispositionum
“ series lege concessa. Quibus omnibus ex ordine peroratis, uno eodemque loco, et tempore, sed et tabularii manu conscriptis sub ob-
“ tentu testium, et eorundem testium manu subscriptis, dehinc consignatis tam ab eisdem testibus, quam a tabulario, plenum obtinebit
“ robur testantis arbitrium. At cum humana fragilitas mortis præcipue cogitatione perturbata, minus memoria possit res plures consequi: patebit eis licentia, voluntatem suam, cui velint scribendam
“ credere: ut in eodem loco postea convocatis testibus, et tabulario, re etiam patefacta cujus causa convocati sunt, etiam chartula promatur, quam susceptam testatori recitabit tabularius, simul et testibus: ut ubi tenor eorum cunctis innotuerit, elogium ipse suum profiteatur agnoscere, et ex animi sui quæ lecta sunt, disposuisse sententia; et in fine subscriptio sequatur testium, necnon omnium signacula tam testium quam tabularii;” *l. 8. Cod. Qui test. fac.*

The law of England, in like manner, seems to require, that the wills of blind persons should be read in their hearing, and acknowledged by them; Swinbourne, *Of Testaments*, part 2. § 11. p. 96. ed. 6.

With regard to the law of Scotland, which, in questions not depending on feudal principles, leans much to that of Rome; the statutes which regulate the formalities of writings, without bearing any express reference to the deeds of blind persons, evidently imply the necessity of reading them at the time of executing. Thus the act of 1681 requires, that the witnesses to deeds executed by the intervention of notaries “ shall see or hear the granter give warrant to the notaries to subscribe for him.” And this mandate must be specified in the docket, so as to be attested by the witnesses; *Kilkerran, Writ*, 18th June 1745, *Berril contra Moffat*. But if the granter be blind,
and

and the deed be not read over in his hearing, and in presence of the witnesses, it is impossible for them to know that it is really that which he meant to authorise; Ersk. b. 3. tit. 2. § 23. Now in fact the deeds in question were not so read over. And at any rate this circumstance, essential in constituting the mandate of the notary, is not mentioned in the dockets, an omission fatal to the deeds.

Answered: The solemnities required by the law of Scotland in authenticating by notaries the deeds of persons who cannot subscribe for themselves, may be resolved into these two particulars: 1st, That the notaries and witnesses should see and know the party whose deed is authenticated; and, 2^{dly}, That they should hear or see him give warrant to the notaries to subscribe for him, he at the same time touching the notary's pen.

In the application of these solemnities to deeds, the law has made no distinction, whether the party is only disqualified for writing, or is also disqualified for reading. The reading of the deed is not required as a solemnity in either case. A blind man may dictate his own will, or he may give directions in a single sentence for executing what he wills; and without any reading in the first case, and without any formal reading in presence of notaries and witnesses in the other, the deed will be sufficiently certain and formal.

Whether a deed executed by a blind person has been at all read to or understood by him, so as to become his will, is a matter of fact to be inquired into. But it is not a solemnity essential to the validity of the deed.

It could not therefore be inserted in the notary's attestation, which ought to contain the report only of what is essential *de solemnitate*, such as the touching of the notary's pen; *Office of a Notary-Public*, p. 308.

As to the law of England; nothing more is requisite, by that law, than that there shall be proof before the court where the challenge is brought, that the will is read over to the granter, although not in presence of the witnesses; Burn's Eccl. Law, N^o 1. part 2. tit. *Wills*.

Perhaps the reading of a deed in presence of two notaries and four witnesses might be a proper solemnity to be established in deeds executed by blind persons; and other additional safeguards may be easily figured. But the sole question here is, what the law of Scotland has already established, not what solemnities the legislature may yet introduce.

The cause was advised, after a hearing in presence.

The opinion of the Court seemed to be, that in the case of a person who is blind, unless the deed presented in order to be executed were at the time audibly read over, (which in point of fact appeared in the present instance to have been omitted), it could not be certainly known whether it truly was that which he meant to warrant the notaries to subscribe for him; and therefore that the witnesses could not then be in a condition to attest, as is required by the statute of 1681, that such a warrant was truly given.

One of the Judges observed: When writing is *de essentia*, the want of it cannot be supplied by parole proof. The authority given to the notaries must appear *ex facie* of the deed, as an essential part of the writing. In the case of blind persons, the reading of the deed is absolutely necessary to constitute that authority, and as such must be expressed in the docket. If it be omitted, as here, the defect, being essential, cannot be supplied.

“ The Lords sustained the reasons of reduction of the settlements executed by the deceased Richard Lowthian; and found, that the destinations therein contained in favour of the defender, Mrs Sarah Aglianby, are void and null, and to be held *pro non scriptis*.”

Adv. G. Fergusson, Tait.

Adv. Rolland, Honyman, Corbet.

Clerk, Menzies.

S.

N^o CCXX.

July 4. 1792.

The VISCOUNT of ARBUTHNOT,

AGAINST

The Honourable JOHN, &c. ARBUTHNOTS, and their *Tutor ad litem*.

TAILZIE.—APPROBATE and REPROBATE.—*One succeeding to a large personal estate, how far obliged to fulfil his predecessor's will, so as to expose him to a forfeiture of a valuable landed property.*

IN 1733, John Viscount of Arbuthnot executed a deed of entail, in the form of a disposition, respecting the lands of Arbuthnot. Failing the heirs-male of his own body, his uncle, and nearest male relation, John Arbuthnot of Fordoun, and his heirs-male, were called to the succession.

After these were called the entailer's other heirs-male, and lastly his heirs-female; the eldest always succeeding without division.

The deed contained the usual prohibitory, irritant, and resolute clauses; and, in particular, it directed, under an irritancy, that the limitations, conditions, and provisions should be inserted in all the subsequent

quent investitures. But it had neither a procuratory of resignation, nor a precept of feisin. Being put into the hands of a friend of the family, it remained with him till 1757, when the entailer died.

Mr Arbuthnot of Fordoun, the institute in the entail, having died some years before, the succession opened to his eldest son, the late Viscount of Arbuthnot, who, in 1759, neglecting the entail, made up titles, as heir to his cousin, under the standing investitures, which were subject to no limitation. Before his succession to the estate and honours of Arbuthnot, he had become bound, by his marriage-contract, to settle his paternal estate of Fordoun upon the heirs-male of the marriage.

In 1777 the late Viscount executed a new entail of all his lands, including those of Arbuthnot and Fordoun. The prohibitory, irritant, and resolute clauses were the same with those in the deed 1733; and the order of succession differed only in this, that upon the failure of heirs-male, his Lordship called "his own nearest heirs and assignees whatsoever;" so that the eldest heirs-female, instead of having, in their order, a tailzied succession, had nothing but a *spes successionis* along with the other heirs-portioners. The heirs of entail were also specially required, under an irritancy, to hold the estates under this entail, and no other title.

The entail 1777 was duly recorded. In 1789 the late Viscount died; and his eldest son, the present Viscount, having expedited a general service under the entail 1733, brought an action for setting aside the subsequent one.

So far as it related to the lands of Arbuthnot, the action was founded on the prior entail; which, though merely personal, and unaccompanied with procuratory and precept, was binding on the late Viscount, as representing the entailer. With regard to the lands of Fordoun, it was contended, that the late Viscount, by his marriage-contract, was barred from laying his eldest son, and the heir of the marriage, under any limitations.

The defenders, who were the present Viscount's children, insisted that the entail of 1733 was cut off by the negative prescription. That, however, was evidently founded on a mistake, as the prescription could not run till the entailer's death in 1757. They farther contended, that notwithstanding the marriage-contract, their grandfather was at liberty to lay his eldest son, and the other heirs of the marriage, under any reasonable limitations; and that the entail which he had executed, and which was merely intended to perpetuate the representation of his family, was of that sort.

Besides, and what seemed to supersede all farther argument, it was stated, that the pursuer had taken up his father's moveable succession to the amount of L. 30,000; so that he was barred from challenging the deeds in question.

The Lords "Repelled the objection to the deed 1733; but found, "that the pursuer, as representing his father, is barred from challenging the deed of entail executed by him."

In

In a reclaiming petition, the pursuer

Pleaded: Where a person executes a settlement, which cannot be immediately effectual, from his want of powers, the grantee, if not liable to the same inability, is in general bound to fulfil the testator's purpose, upon his availing himself of those parts of the settlement which are favourable to him. But where the settlement is not merely impracticable from a defect of power in the testator, but the heir is required to do an illegal act, or one which would expose him to a forfeiture, this, like a condition which is naturally or morally impossible, ought to be disregarded, and the heir permitted to take under the will, without any obligation to perform what has been required from him. The present case is to be viewed nearly in the same light, as if the testator, along with his own lands, had entailed those which belonged to a third party, where the heir of entail, though obliged to fulfil the testator's injunctions as to the former, might warrantably omit taking any steps as to the latter; Erskine, 3. 3. 85.

Answered: If the pursuer had made up his titles under the entail executed by his father, a very few years would have invalidated the former one; and therefore, if he is under any embarrassment, it is one imputable to himself only. But the subsistence of that deed, though it may endanger the pursuer's right, does not preclude the other, which is effectual, till it is brought under challenge, and may, by the force of prescription, be rendered unchangeable. Besides, the pursuer must be barred from challenging the latter deed, so far as it lays him personally under farther limitations, the idea of setting aside a deed *in toto*, because in one respect it cannot be effectual, being inadmissible; and at any rate, if the pursuer were to be indulged in voiding the entail 1777, so far as it is inconsistent with the former one, he ought to be compelled, by employing the moveable funds which belonged to the late Viscount, in the purchase of lands, subject to the same restraints which are prescribed in the deed executed by him, to fulfil so far as it is possible, his father's intentions.

After advising the reclaiming petition with answers,

The Lords "sustained the reasons of reduction of the disposition
"and deed of tailzie executed by the deceased John late Viscount of
"Arbuthnot, *quoad* the estate of Arbuthnot; but affoizied as to the
"estate of Fordoun and others."

Ordinary, Lord Eskgrove.
Gordon, Clerk.

Act. Dean of Faculty, Dickson.

Alt. Wight.

C.

N^o CCXXI.

N^o CCXXI.

July 6. 1792.

JOHN BALLENDEN,

AGAINST

The DUKE of ARGYLE.

IRRITANCY: Act 1577, c. 246.—*Legal irritancy of a feu-right ob non solutum canonem sustained.*

THE statute of 1597, cap. 246. enacts, “ That in case it shall happen, in time coming, any vassal or feuer holding lands in feu-farm of us, or any other superior, immediately in feu-farm, to failzie in making payment of his feu-duty, by the space of twa years haill and together, that they shall amit and tyne their said feu of their said lands, conform to the civil and canon law, sicklike and in the same manner as if an clause-irritant were specially ingrossed and insert in the said infestments of feu-farm.”

Ballenden held the lands of Wester Pitgober in feu of the Duke of Argyle, the feu-duty being L. 4, 14 s. Scots, together with 10 bolls of barley and 2 bolls of oats.

He having failed to make payment of the feu-duties during five years, the Duke raised against him, on the above-mentioned statute, (his charter not containing any irritant clause), a process of declarator of irritancy, in which appearance was made for the defender. But as he failed nevertheless to purge the irritancy, the Duke obtained decree.

An action of reduction of this decree was afterwards brought by Ballenden; in the course of which he made offer of full payment of the arrears of feu-duties, with interest upon interest, and whatever else should be necessary for affording complete indemnification to the superior; and insisted on the hardship of his property, estimated at L. 3000 Sterling, being forfeited, on account of a demand comparatively so trifling, and which, to the utmost limits of justice, he was ready to satisfy; the political circumstances which gave occasion to this ancient enactment having now undergone a thorough change.

“ The Lord Ordinary, in respect of the decree having been obtained *in foro contentioso*, repelled the reasons of reduction.”

And, on advising a reclaiming petition and answers,

The Court, considering the statute in question as still in force, and that, though irritancies such as the present might be purged at the bar, this opportunity had been here neglected, and could not be renewed, found themselves under the necessity of affoilzieing from the reduction, as the Lord Ordinary had done; but not without expressing regret, that it was not in the power of the Court to give relief to the pursuer.

A petition reclaiming against this judgement was appointed to be answered; but upon being advised along with the answers, it was refused.

Lord Ordinary, *Dreghorn*.
Clerk, *Gordon*.

Ast. *Honyman*.

Alt. *Craig, A. Campbell jun.*

S.

AP.



A P P E N D I X.

Nº I.

January 29. 1788.

The LORD PROVOST and MAGISTRATES of EDINBURGH,

A G A I N S T

The FACULTY of ADVOCATES, and the SOCIETY of WRITERS
to the SIGNET, in behalf of the COLLEGE of JUSTICE.

COLLEGE OF JUSTICE—Found exempted from the payment of Poors money, and other taxations imposed by the Magistrates of Edinburgh.

THE COLLEGE of JUSTICE was instituted at first anno 1532, in the minority of James V. and during the regency of the Duke of Albany. For the purpose of obtaining a fund for its establishment, not less than from reverence to the Holy See, the government of Scotland had recourse to the authority of the Roman Pontiff; and bulls were issued by Clement VII. and by his successor Paul III. ratifying the institution, and allotting for its support a portion of the revenues of the church. An exemption from taxes was likewise in the number of its destined advantages. The letters-patent issued by the government, which were confirmed by the sanction of the last-mentioned pope, declare an immunity “*ab omni decima contributione, collecta, exactione, oneribusque ordinariis et extraordinariis.*”

In 1537, on occasion of the King's majority, an act of parliament was passed in ratification and confirmation of the previous establishment of the College of Justice, the Judges of which consisted partly of churchmen; and it contains the following enactment: “*At-
“ tour because the said persons maun await daily upon our said ses-
“ sion, except at feriat times, and should be therefore privileged above
“ others, herefore we have exeemed, and by the tenor hereof exeem
“ them, and every one of them, both spiritual and temporal, from
“ all paying of taxes, contributions, and other extraordinary char-
“ ges to be uplifted in any times coming, and from the bearing of*

(A)

“ any

“ any office or charge within burgh or outwith, but if it be their own free will and consent.”

In 1540, when the King had attained “ the perfect age of *twenty-five years*,” another statute was made, “ again approving and ratifying all the privileges granted to the College of Justice.” And in 1543, after the accession of Queen Mary, the parliament enacted a similar ratification.

Meanwhile, as the religious houses afforded maintenance to the poor, every species of taxation for their support was unknown. Afterwards, when upon the Reformation the ample possessions of the church were wrested from it, the reformed clergy remonstrated against the now helpless condition of the poor, and insisted on a certain share of the ecclesiastical patrimony being appropriated for their benefit.

These circumstances gave occasion to the act of parliament of 1579, cap. 74, which still continues the basis of the poors-laws of Scotland. This statute authorises the provosts and bailies of boroughs, and in landward parishes, certain judges appointed by the King, “ to tax and stent the whole inhabitants within the parish, according to the estimation of their substance, without exception of persons, to such weekly charge and contribution as shall be thought expedient and sufficient to sustain the said poor people.”

As the members of the College of Justice were not subject to be convened before any inferior jurisdiction, it is remarkable that the prescribed mode of enforcing this act, was “ to call such obstinate and wilful persons as refused to contribute to the relief of the poor before the said provost and bailies, and judges in landward districts.”

There exists no evidence of the manner or extent in which this tax was levied; and of course none that the College of Justice was subjected to the payment of it.

In 1592 another act was passed, cap. 155, “ anent the taxation of burghs, watching and warding,” which was qualified with a caveat, “ that this act be not prejudicial to the members of the College of Justice, and to their privileges and immunities granted unto them, or whereof they have been in use in times bygone.”

In 1593, another statute again ratified every prior enactment in favour of the College of Justice, without any manner of diminution or derogation of the same in any sort, by whatsoever other act or statute that may or can be extended or interpreted in the contrary, either special or general.”

The important statute of 1597, cap. 279. followed. It is intitled, “ Of persons dwelling within burgh, subject to the help of the poor, to watching and warding;” and after setting forth that many of the inhabitants of boroughs “ of reasonable substance had refused to contribute for the entertainment of the poor, watching and warding within burgh,” it enacts, “ That all such as have their residence and dwelling within the said burghs, and may spend L. 100 of yearly rent within the same, or stented by the discreet neighbours to be worth 2000 merks in free goods, shall be subject to be
“ burdened

“burdened with the rest of the inhabitants, for the advancement of the glory of God, his Majesty’s service, and well of the burgh where they dwell; providing always, that this act be no way extended to such as are excused for his Majesty’s service, as one of ilk occupation for that cause; neither to any persons that are members of the College of Justice, and admitted by the Lords of Session.”

In the same year another act passed, imposing a general taxation, and expressly annulling all privileges and immunities tending to any exemption from it; but under the exception of those of the College of Justice.

From that period downward to the close of the following century, there is no evidence of any assessment having been laid by the magistrates of Edinburgh on the College of Justice for the maintenance of the poor. But in the mean time their privileges were repeatedly ratified by acts 1633, cap. 23.; 1661, cap. 23.; 1670, cap. 8. and 1685, cap. 19.

Two different taxations had in the interval been obtained by the magistrates of Edinburgh; one, an annual assessment for the provision of the ministers of the town, called annuity, and the other, a duty under the name of impost, on liquors imported into town. In 1678, the magistrates charged some of the members of the College of Justice for payment of these taxes, which produced an action declaratory of their privileges, in which the Court in 1687 gave judgement, “declaring them free from the payment of these taxes;” and this decree afterwards passed into an act of federunt. But in this process nothing was agitated with respect to the poors-money.

In 1686 an act of parliament passed, authorising the Lords of Session, with the consent of the magistrates of Edinburgh, “to impose such taxes on all the inhabitants, as should be found necessary for cleaning the streets, and purging them of beggars.” By an act of federunt accordingly, the Court empowered the magistrates to levy L. 500 per annum for three years; and in this act it is specially set forth, that the College of Justice had voluntarily submitted to this exaction; to which is added a salvo of “their privilege of being free from all stents and impositions within the town of Edinburgh.”

In 1692, the Lords of Session gave their authority to another assessment for three years, on all the inhabitants, including the College of Justice, without any express salvo. And in 1694 a similar assessment was imposed.

In 1693, the Privy-council of King William issued a proclamation, requiring all the magistrates of the kingdom, particularly those of Edinburgh, “to execute effectually the several statutes relative to the poor.” On this occasion, the compulsory of poinding was employed against some members of the College of Justice; but a bill of suspension being presented, 1st March 1695, it was immediately departed from. A few months afterwards, the statute of 1695, cap. 43, was passed, “ordaining the acts relative to the poor to be put to vigorous execution:” But still the magistrates continued to desist from their proceedings against the members of the College of Justice.

In

In the beginning of the following century, however, the magistrates again attempted, as before, to poind the effects of some individuals of that body; not however, it seemed, so much under the authority of the proclamation in 1693, or of any laws or statutes, as of the act of federunt 1687, though expired. The bill of suspension formerly preferred was now passed (1710); but the question was not brought to any decision.

For the two years from 1712 to 1714, an assessment was laid by the Lords of Session, in virtue of act 1686, on the members of the College of Justice, of two per cent. upon their house-rents; but this was done with the express consent of that body.

Again, a voluntary contribution took place for three years, from 1731 to 1734.

In 1749, seven years after the charity-workhouse of Edinburgh was established, a new scheme being projected for a poors-rate, the magistrates, in several papers published by them on that occasion, acknowledged the exemption of the College of Justice.

At length in 1787, a bill was brought into parliament, for the direct purpose of subjecting the members of that body to the assessments imposed by the magistrates. The bill meeting with opposition on the ground of private right, was thrown out; and the magistrates, in order that the question of law might be brought to a determination, again employed the compulsory of poinding, which was followed by suspensions in the name of different classes of the members of the College of Justice, and so the question came under the consideration of the Court.

Pleaded for the suspenders: By the act of parliament in 1537, framed in conformity to the letters-patent, and the Papal bulls, on which the constitution of the College of Justice was originally founded, there is an express exemption in its favour of all taxations whatsoever to be levied in time to come; an immunity repeatedly re-enacted or confirmed by the series of statutes enumerated above, and prior to 1579.

Until that year no tax had been imposed for the maintenance of the poor; and it is true, in the statute that was then passed, the general expression "of all inhabitants in the parish, without exception of persons," might seem at first view to comprehend the members of the College of Justice; but when more closely examined, it will receive an opposite construction. 1. They are to be understood not as stated inhabitants in the sense of the statute, but as attendants on the Court, whose residence is in consequence occasional and transient. 2. Those declared liable to the taxation, were persons subject to inferior jurisdictions, which they are not. 3. No privilege or right once granted, is to be resumed without a special enactment: *Speciali non derogatur generalibus*; and where the *salvo jure* is not expressed, it is always understood. 4. There is not any evidence, that in fact the assessment by this statute was ever laid on the members of the College of Justice.

Accordingly,

Accordingly, the statute of 1597, cap. 279, which was preceded by several other enactments recognising the immunities of the College of Justice, after subjecting, in comprehensive terms, all persons of a certain extent of substance, residing in boroughs, to the support of the poor, subjoins an explicit exemption of that body. In the following statutes down to the end of the last century, their privileges were ratified from time to time, while they themselves continued free from the corresponding burdens to which the other inhabitants were subject.

In this situation, the acquiescence of the magistrates of Edinburgh demonstrated their consciousness of the validity of those claims which are now called into question. Nor was their silence with regard to the exaction of poor's-money, in that process of declarator which terminated in 1686 by so ample a recognition, in other respects, of the privileges of the College of Justice, to be otherwise accounted for, than by the notoriety of the exemption from that particular imposition; for this, it is evident, was at least as favourable a claim as those relative to impost and annuity, and, so far as it was founded on the express enactment of 1597, more clearly unexceptionable.

Thus, among the privileges of the College of Justice, originally founded on special statutes coeval with the constitution of the Court, and frequently renovated by succeeding grants, the exemption from any poor's-rate imposed by the magistrates of Edinburgh, appears supported by constant immemorial usage, uncontradicted by any record or tradition; to which is to be added, the explicit acknowledgement of the community itself; and all this even strengthened by the consideration of those other immunities being relinquished, or lost by disuse; while the desultory attempts to impede that uninterrupted possession, serve only to show, it was not from negligence, but conviction of the right, that the magistrates did not bring the question to a final issue.

Answered: The statute of 1579 formed at first, as it still forms, the basis of the poor's-laws of Scotland. In clear and explicit terms, it subjects, without exception of persons, all inhabitants of parishes to taxation for the maintenance of the poor. To deny the appellation of inhabitants to persons inhabiting a town, merely because they are members of the College of Justice, seems a singular absurdity, and is inconsistent with the *salvo* in the acts of parliament in 1592 and 1597 now founded on by the suspenders; because these plainly suppose, that the term *inhabitants* would have comprehended them, as otherwise the exception must have been superfluous and nugatory. The same proper application of the term to the members of the College of Justice, occurs in the statute of 1690 respecting hearth-money; in 5th Geo. I. or the riot-act; and in the statutes imposing a tax levied in Edinburgh, for keeping the highways in repair.

Neither is the inference just, that the suspenders draw from the clause nominating a particular jurisdiction for enforcing the assessment. Wherever a statutory jurisdiction has been created, the members of the College of Justice are comprehended, if not specially excepted; as, for example, the jurisdiction conferred on justices of the

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peace

peace in offences against the revenue-laws. But even their not being comprehended, would not debar the levying of an assessment from that body, to which the enactment of that clause was not essential; as it might be rendered effectual, like any other civil obligation, by the Court of Session. Accordingly, no such plea has ever been maintained by members of the College of Justice residing in other boroughs, though they are equally entitled to decline inferior jurisdictions.

With regard to the idea of a general enactment not being competent to undo a special privilege, it is contradicted by the practice of introducing saving clauses: and when those are omitted, the privilege falls. Thus, to take a strong example from the case in hand, the act 1537 exempted the Lords of Session from bearing any share in extraordinary supplies imposed by parliament for the support of government; and in every supply or land-tax act down to 1670, a special salvo of that privilege was carefully ingrossed; but at length the privilege being to be discontinued, all that was necessary for effecting this, was to leave out that special exception; and upon this footing alone are the members of the College of Justice at the present day liable to pay land-tax.

The other acts of parliament relative to the poor are comparatively of little importance, and require no particular observation. With respect to the statute of 1537, which exempts the College of Justice "from taxes, contributions, and other extraordinary charges," these were no other than the national taxes or supplies, which were properly termed *extraordinary charges*, as in those days they were seldom imposed by parliament, and only upon very urgent occasions. For as to the ordinary established revenue of the Crown, which, besides the rents of the King's patrimony, consisted chiefly of the feudal casualties exigible from the Crown-vassals, and of certain customs upon goods imported and exported, it never was supposed that any members of the College of Justice were entitled to an exemption.

Still less was it imagined, that the exemption of this statute had the effect to relieve that body in whole or in part from the ordinary burdens imposed upon property, either by the common or statute law, for special purposes; such as parochial assessments for building and repairing kirks, for establishing schools, for keeping in repair highways, for the maintenance of the poor, or for other purposes of a similar nature. A proof of this is the fact, that through all the rest of Scotland, except Edinburgh, the College of Justice have uniformly submitted to such burdens; whereas the exemption, if at all applicable to assessments of this kind, must have had an universal operation in every county, borough, and parish of the kingdom. Indeed equity requires, that the object of such exemptions should be only national taxes, that the corresponding increase of public burdens may fall equally on the people at large, and not on any particular description of individuals, as the inhabitants of a borough or of a parish. The subsequent statutes preceding 1579, it is evident, though they ratify, do not extend the privileges bestowed by that of 1537.

The statute of 1592 relates to such burdens as are peculiar to burghs. As to that of 1597, although the entertainment of the poor

is mentioned in its preamble, it could not be intended to establish any system for that purpose, which was already effectually served by the statute of 1579. Its object in all probability was, to subject the inhabitants described in it, though not burghesses, to the burden of watching and warding, which is expressly mentioned in the preamble; and likewise to those stents and assessments which the magistrates of royal boroughs were understood to have a right of imposing *virtute officii* for the utility of the burgh, of which an example occurs in the case of the town of Aberdeen *contra* Lisk and others, Stair, 11th January 1678. In this view, a salvo of the privileges of the College of Justice may be esteemed very natural and proper. But at any rate, the legal effect of a saving clause or exception from a statute, in favour of any person or persons, can go no farther than to save from the operation of that particular statute alone in which it is inserted; and the chargers are not founding their claim on act 1597, more than if it had never existed.

With regard to the alleged immemorial possession, of this there is no evidence. On the contrary, the College of Justice was repeatedly assessed by the Lords of Session under the authority of act 1686; and the salvo inserted on two of those occasions, without creating any new privileges, could only preserve such as already belonged to that body.

In point of law, no disuse of payment could establish an exemption for the future, prescription having no operation against any public burden created by statute. Though a particular estate had been overlooked in levying the land-tax, or it had been omitted to collect duties or customs within a certain district, such omissions could never prevent the due execution of the law in time coming. On this ground was decided a question respecting the non-payment of cess for time immemorial, Fountainhall, 21st July 1710, Town of Paisley *contra* their Vassals.

The Lord Ordinary reported the cause, when

The Court unanimously suspended the letters, and assoilzied from the declarator.

Reporter, Lord Braxfield. For the Chargers, Lord Advocate, Blair, et alii. Alt. Dean of Faculty, et alii. Clerk, Sinclair.

S.



(N^o II.)

June 22. 1791.

HENRY PIERCE, and his ATTORNEY,

A G A I N S T

DAVID LIMOND.

ADJUDICATION.—*In what manner an adjudication is made the first effectual one, when the debtor has not been infest.*

THE lands of Brackenhill, held of a subject, were disposed to Hugh Rofs. But although the disposition contained a procuratory of resignation and a precept of seisin, he never was infest.

After the death of Hugh Rofs, his son Hugh Rofs expedite a general service, as heir to his father, thus acquiring right to the unexecuted procuratory and precept respecting these lands. But he also omitted to take infestment.

The affairs of Hugh Rofs the younger having gone into disorder, his creditors led adjudications. Among others, David Limond adjudged the lands of Brackenhill, and charged the superior to enter him as vassal. And after a considerable interval, Henry Pierce led another adjudication; but in order to make it effectual, he recovered the disposition in favour of Hugh Rofs the elder, and took infestment, by executing the precept of seisin contained in it.

The lands having been *judicially* sold, the common agent proposed to rank the creditors on the price, as if David Limond's adjudication had been the first effectual one. But it was objected for Henry Pierce, That a charge against the superior of the adjudged lands, where the debtor was not infest, was inept; and that of course the subsequent adjudication taken by Mr Pierce was to be considered as the leading one. In support of this objection, he

Pleaded: By a decree of apprising, which was the earliest method of attaching landed property, in Scotland, for the debts of the owner, the lands were judicially disposed to the creditor. But in order to

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make

make the transfer complete, according to feudal forms, it farther behoved the creditor to obtain infeftment.

When the debtor had been infeft, the appriſer was authoriſed to apply to the ſuperior of the lands, who, upon receiving a year's rent as a compoſition for renewing the inveſtiture, was obliged to give infeftment, the Court of Seſſion being in uſe to iſſue letters charging him to do ſo, without any farther investigation. If, after being thus required by one creditor, the ſuperior took it upon him to give infeftment to another, this, as a fraudulent act, was altogether diſregarded; Hope, Minor Pract. § 275.; Craig, 3. 2. 20. And this is the rule recogniſed by the ſtatute of 1661, introducing a *pari paſſu* preference of ſuch appriſings as are within year and day of the firſt effectual one, which is declared to be that "which is preferable in reſpect of the firſt infeftment, or the firſt exact diligence for obtaining the ſame."

In the caſe of an appriſing deduced againſt one who had never been infeft, the ſituation of matters is very different. In ſuch a caſe it would have been in vain to apply to the ſuperior, whoſe vaſſal the debtor had never been. As a voluntary diſponee in ſuch a caſe was obliged to complete his right, by executing the precept of ſeiſin, or by reſigning in virtue of the procuratory, ſo the appriſer was obliged to follow the ſame courſe. And now that adjudications have been ſubſtituted in the place of appriſings, it muſt follow, that when the debtor has never been feudally veſted in the lands, a charge againſt the ſuperior muſt be inept, in the ſame manner as if the ſuperior had proceeded to give charter and infeftment to the adjudger, without being formally required to do ſo; and ſo it was ſolemnly decided, Dictionary of Dec. vol. 1. 6th December 1695, Dewar *contra* French.

Answered: The ſtatute of 1661 declares in general terms, that a charge againſt the ſuperior ſhall be equal to infeftment; wherever, therefore, a charge has been given, the requiſites of the ſtatute muſt be conſidered as complied with, and the preference of the creditors muſt be regulated by it. To enter into farther diſcuſſions would only be injurious to creditors, who cannot always know how their debtor's rights ſtand; and ſo the rule is laid down by all the authors, no diſtinction being made whether the debtor was infeft or not. Stair, 2. 3. 29. 3. 2. 49.; Erſkine, 2. 12. 24.

Where the ſuperior pays no regard to the charge at the inſtance of an adjudger, it would be equally unjuſt to enquire, whether the debtor had been regularly received as the vaſſal, as it would be to examine, whether, along with the warrant for charging the ſuperior, the creditor had offered a year's rent, without which, however, a ſuperior is not obliged to give infeftment to an adjudger. The deciſion quoted on the other ſide appears to have been erroneouſly abridged in the Dictionary, the queſtion in the caſe there noticed, having turned on the effect of a general charge, and of the ſtatute 1693, reſpecting unexecuted procuratories. At any rate, it is a ſingle deciſion, in oppoſition to the general tenor of the beſt authorities.

Jan. 1792.

A P P E N D I X.

(11)

The Lords unanimously found, That the adjudication at the instance of Henry Peirce was the first effectual one.

Reporter, *Lord Swinton.*
Peirce, *Abercromby, Honyman, et alii.*

For David Limond, *Mat. Ross, et alii.*
Clerk, *Sinclair.*

For Henry

C.

(N^o III.)

January 17. 1792.

CATHARINE BROWN, and others,

AGAINST

The YORK-BUILDINGS COMPANY.

ANNUALRENT—RANKING AND SALE:—*Lands being sold judicially, the whole sums due to the creditors, interest as well as principal, are held as a capital at the period when the price begins to bear interest.*

IN 1777 an act of parliament was passed, authorising the sale of the whole estates in Scotland then belonging to the York-buildings Company, to be made under the direction of the Court of Session, without waiting for the conclusion of the ranking. And under this authority those various estates were sold.

Certain creditors afterwards preferred petitions to the Court, praying, that they might be found “intitled to state the accumulated sums in their adjudications, and interests thereon, as a principal against gain bearing interest from the terms when the prices of the estates became payable.” In support of this claim they

Pleaded: The statute 1681, c. 17. ordains, that the prices of the lands sold in consequence of that enactment, shall be distributed among the creditors according to their legal preferences, “whether the said creditors have compeared or not:” and consequently the right to the price arises prior to the actual division. But if the prices themselves were distributed among the creditors, it must certainly follow, that the profits arising upon these prices should also fall to them. The prices, by the act of the law, are substituted to the creditors in lieu of their debts and diligence, and the interest of the prices must belong to those to whom the prices themselves belong. *Accessorium sequitur principale.*

By act 1690, c. 20. it is provided, that “if no buyer be found at the rate determined by the Lords, it shall be lawful to the Lords
“ to

“ to divide the lands and other rights among the creditors, according
 “ to their several rights and diligences.” Now it is obvious, that as
 this might take place long before the adjustment of the debts, the in-
 termediate rents would belong to the creditors, though their right to
 possess must have been postponed till their claims were finally ascer-
 tained.

From the statute of 1695, c. 6. authorising purchasers to consign
 the price, and declaring that the consignment is to lie at interest for
the greater benefit of the creditors; it is likewise evident, that, whether
 the creditors were already ranked at the time of the sales or not, the
 interest of the prices was to belong to them.

*Accordingly on searching the records it appears, that in every case
 which occurred between 1681, when the act passed, and 1695, the
 creditors in judicial sales were found intitled to interest upon their
 shares of the price, after it became payable, whether such shares cor-
 responded to debts bearing interest or not.

The object of the act 1695, in ordaining the ranking to precede
 the sale, was to check the practice of purchasers buying up the bank-
 rupt's debts, and by engaging in the litigation, wilfully protracting
 the process of ranking. And in all cases where, by any acci-
 dent, litigation took place after the sale, particularly in consequence
 of the usage of reserving points of dispute for the division of the price,
 as soon as the share in the price to which each particular creditor had
 right was ascertained, he drew it, with the interest which arose upon
 it from the time when the price bore interest. Fac. Col. 31st July
 1767, Ranking of Dudhope.

The regulation of 1695, however, did not affect judicial sales at the
 instance of heirs; the sale still continuing to precede the ranking, and
 the creditors drawing interest on the price from the period of the
 sale. Their right to do so was questioned only in the case of Inver-
 gordon in 1754; when it was recognised first by Lord Elchiesordi-
 nary, and afterwards by the Court.

Nor is it disputed, that since the passing of the statute 1783, credi-
 tors, when ranked, have always drawn, in the division, the interest
 that arose upon their shares of the prices, in proportion to the amount
 of the debt, principal and interest, as it stood at the time of the sale.

It seems therefore to be established, both on the principles of
 law, and upon the invariable practice, that the creditors, in all ordi-
 nary judicial sales, whether at the instance of creditors, or of appa-
 rent heirs of deceased persons, are intitled to the interests accruing to
 the dividends that are found to have been due to them, as at the pe-
 riod of the sales.

With regard to the above-mentioned statute of 1777, its object was
 not to make any innovation, except what was necessary for carrying on
 a business, which the subsisting laws had, from forty years experience,
 proved unable to accomplish; and this was to make the sales precede
 the ranking, and to encourage creditors to come forward with their
 claims, by enabling the Court to issue warrants for payment, without
 waiting a final distribution. In all other respects the Court were ex-
 pressly ordered to divide the prices in the same form and manner as
 practised

practised in other sales of bankrupt-estates; and, in particular, they were to take the prices payable to the creditors, which appears to have been the invariable practice for 110 years past, originating in the special enactments of the statute 1681. It does not seem, therefore, that the profits arising upon the shares of the creditors can descend, in this case, according to a different rule from what has obtained in all other cases.

Answered: Neither adjudication nor voluntary investment, nor process of ranking and sale, sequestration in this, decret of ranking, or the sale itself, could produce any innovation of the debt, or delegation of the purchaser in the room of the original debtor. The debt remains after the sale the same that it was before it. Hence, prior to the division or payment of the price, a real creditor may still attach any personal estate of his debtor; and, on the other hand, were the debtor to offer payment of any debt, without accumulation at the date of the sale, it does not seem that the tender could be refused.

No just principle therefore appears, upon which an accumulation from the term at which the price bore interest could be founded, even where there had been a previous concluded ranking, although such a practice may have been introduced.

It was not, indeed, the notion of accumulation upon the debts, properly speaking, on which the practice proceeded; but that a proportion of the price did, at the time of the sale, or that from which it bore interest, come to belong respectively to the creditors. But this could not possibly be without an imputation of that proportion *in solutum* of the debt, and a consequent extinction of it; which extinction, however, was not supposed, nor did actually take place.

At the same time, though the practice were held to be right where the ranking preceded the sale, this concession could not affect the present argument; for which, it is sufficient to shew, that there can be no ground for accumulation when there has been no previous ranking. Here there is no practice to combat; for, by the practice, no accumulation or division takes place till the ranking be concluded, as well as the lands sold. The ranking being previously concluded, as soon as the price exists, the right and interest of every creditor in it, and his share of it, are certain, nothing but calculation being wanted to make it liquid. But when there has been no ranking, it is impossible to know, at the time of the sale, who will have any right to the price, or to what amount.

That such accumulation has no foundation in justice, will appear on taking a view of the rights and interests of the debtor, of the creditor, and of other creditors, particularly postponed creditors.

Suppose a debtor's estate to exceed in value the amount of his debts, while a creditor has some doubtful claim not settled perhaps for twenty years after the sale, with what justice can the debtor's burden be increased by accumulating interest upon interest, when it was impossible for him to pay the debt till its justice and extent were ascertained?

(D)

When

When the sale precedes the ranking, the defender, in the mean time, remains subject to personal diligence at the instance of creditors; but this could not be, on the principle of accumulation, viz. that a proportion of the price is substituted for, and consequently extinguishes the debt. The same inconsistency appears, in regard to the creditor's right of attaching any separate property acquired by the debtor during the ranking.

As to the creditor, again, if he obtains his accumulation on the footing of the same substitution, the consequence is, that he can get no more interest than accrues from his part of the price. But, suppose it to yield only 3 per cent. could he be compelled to take this instead of the legal rate of 5 per cent? If he could not, it is plain there has been no substitution of the price for the debt, the sole principle of accumulation.

Farther, the purchaser may become insolvent, and the subject may sink in value, or wholly perish. But it is clear the creditors do not run those hazards; which proves them not to have such a right to the price as to intitle them to the accumulation.

With regard to posterior creditors, suppose that a subject worth L. 1500 is sold in three lots, upon which three creditors are ranked; A, *primo loco*, whose debt at the time of the sale is L. 500; B, *secundo loco*, L. 500; C, *tertio loco*, L. 500; but during the ranking the purchaser of one of the lots fails, and its value is greatly diminished. In this case C would be cut out. But on the principle of substitution, and consequent appropriation, A and B would have run an equal hazard with C.

The practice has been appealed to on the other side. Even in the period between 1681 and 1695, it was not general in favour of accumulation, as appears from Fac. Coll. 7th January 1757, Middleton against Falconer. And as to the practice subsequent to 1695, accumulation could not have been made till after the ranking, as well as the sale.

Independent of all general argument, the claims of accumulation now made, are excluded by the sales having proceeded on a special statute made *pendente lite*; authorising early sales, by way of privilege, for special purposes; but containing no warrant for any accumulation of debts earlier than it could have taken place if there had been no deviation from the ordinary course of law, by which there could have been no sale till the ranking was closed, and consequently no accumulation till then.

Observed on the Bench: The case of Invergordon is very much in point; for the Court does not seem to have gone upon the principle of a decree of sale at the instance of the apparent-heir being an adjudication to the effect of accumulating each creditor's debt, as it has truly no such effect; but upon the very principle which is pleaded here, of the price being held as a fund for payment of the creditors, and as belonging to them in the first place, together with the interest accruing thereon, till full satisfaction is made to them of their debts, leaving only the reversion, if any, to be taken by the heir;

heir; and further, that in accounting with the creditors, their debts must be taken as at the period when the fund was produced, whatever delays might happen in adjusting their amount, and finally closing the order of ranking and division. If no competition ensued among the creditors, and if the price were clearly sufficient to pay the whole, they would be intitled to immediate payment from the purchaser. In all events they are intitled to their dividends of the price, with the interest thereon, so soon as their claims can be adjusted; nor is there any reason why the necessary delays, or perhaps the groundless disputes, raised up either by the purchaser, the common debtor, or postponed creditors, should have any effect to lessen their draught, more than to increase it. In applying, therefore, such payment when received, the calculation of their debts must go back to the period when the fund was produced; and consequently must include the whole debt, principal and interest, as a capital at that period. It is in that sense, and to that effect alone, that the debt is accumulated; for to every other effect the debt remains in its former state. Were any later period to be adopted, such creditors as had a large proportion of their debts not bearing interest would be injured; the debtor would, in every case where the funds bore legal interest, be a gainer at the expence of his creditors; and even in some instances, an estate bankrupt at the time of the sale, might produce a reversion. It would become the interest of the postponed creditors, and common debtor, to protract the ranking and division by every means in their power. Had the sales of the York-buildings Company estates been delayed till now, the creditors might, in the mean time, have accumulated their debts by adjudications, which would have had an equal or worse effect against the common debtor.

The following, after a hearing in presence, and advising memorials, was the judgement of the Court: "Find, That the price of
" the estates, with the interest produced therefrom, is a divisible
" fund, to be applied to the payment of the creditors, as they have
" been, or shall be ranked; and that the account of their debts
" must be taken, and the application of their dividends made, as at the
" period when the price began to bear interest; the whole sums due
" to them, whether consisting of money bearing interest or not, be-
" ing stated in said account as a capital at that period, according to
" the rules which have been usually observed in other judicial sales at
" the instance of creditors, and in sales at the instance of apparent
" heirs."

Upon advising a reclaiming petition for the York-buildings Company, with answers, the Court (17th January 1792) adhered.

For the York-building's Company, *Lord Advocate, J. Clerk, et alii.*
Solicitor General, Macdonald, et alii.

For the Creditors,

S.

(N^o IV.)

January 24. 1792.

LORD DAER, Eldest Son of the Earl of SELKIRK,

A G A I N S T

The Honourable KEITH STEWART, and Others, Freeholders
of the County of Wigton.

MEMBER OF PARLIAMENT.—*The eldest Son of a Peer of Scotland has not a right to be inrolled a freeholder to vote in the election of members of parliament for counties in Scotland. **

AT the Michaelmas meeting of the county of Wigton, held upon 6th October 1789, Basil William Douglas, commonly called Lord Daer, eldest son of the Earl of Selkirk, presented a claim to be admitted on the roll of Freeholders, upon certain titles therewith produced.

To the titles upon which the claimant desired to be inrolled, no objection whatever was stated; but the minutes of the meeting bear, "That a vote having been put, Whether the claimant, as the eldest son of a Peer, be capable to be inrolled as a Freeholder, or not? all the Freeholders present voted Not, except Sir William Maxwell, who voted Inrol, and the Reverend Dr William Boyd, who declined to vote. The meeting, therefore, refused to inrol the claimant."

Against this determination of the Freeholders Lord Daer presented a complaint to the Court of Session, under the authority of the statutes of the 16th of the late King, and of the 14th of his present Majesty. The Court ordered a hearing in presence, and the cause was argued for several days.

Upon the part of Lord Daer it was stated, That the fact of his being possessed of lands holding of the Crown, fully intitling him to

* The circumstance of this being a question regarding the Constitution of the Ancient Parliament of Scotland, and necessarily depending upon a variety of historical facts and deductions, will, it is hoped, prove a sufficient apology for stating the argument at so much length.

be inrolled a freeholder of the county of Wigton, was not disputed; but notwithstanding this, it was maintained, that by being the eldest son of a peer of Scotland, he was precluded from that right which the same property would give to any other person; and therefore the subject of enquiry was, by what law, or by what authority, this exclusion could be supported.

In following out this enquiry, it was proper to take a view of the constitution of the parliament of Scotland, in so far as it respected the rights of the Eldest sons of Peers, from the earliest periods to which it can with any certainty be traced, down to the time of the treaty of Union in 1707; and this came naturally to divide itself into two different branches: The *first*, comprehending the ancient period down to the year 1587, when representation was introduced; and the *second*, comprising the period from 1587 down to the act 1707, under the authority of which the present question is to be tried.

With respect to the *first* of these periods, it was not necessary to engage in any disquisition respecting the *original* form and constitution of Parliament: for, without attempting to investigate a subject so involved in obscurity, it was sufficient to begin at a period where more certain light might be discovered; and it might safely be affirmed, that as far back as laws and records furnish information, the Parliament of Scotland was the Great Council of the King, composed of ALL THOSE who held lands of the Crown *in capite*, together with representatives from the Royal Boroughs. At what period these last were introduced, is an inquiry of no moment in the present question; but that EVERY vassal holding lands immediately of the Crown, whatever the extent of these might be, was a constituent member, and bound, as such, to give attendance to the King in Parliament, seems to be a fact of which no doubt can be entertained; *Lord Stair's Inst. b. II. tit. 3. § 4*; *Lord Kames's Essays Brit. Antiq. p. 25*.

It was needless, however, to go any farther than our *Statute-Book*, which afforded the fullest evidence, of every vassal of the Crown being obliged to attend in Parliament, and of that being only afterwards dispensed with, upon condition of the lesser Barons sending representatives. When, from the alienation and subdivision of land-property, the vassals of the Crown came to multiply, so those who possessed inconsiderable estates, although they regarded their right to sit in the National Council as a privilege, which they would not entirely relinquish, yet considered it also as a burden, which they were desirous of being subjected to, upon extraordinary occasions only. In an age, likewise, when force was more prevalent than laws, they found themselves of little consequence in comparison with the great and more powerful Barons; and in this way it happened that they came to be extremely remiss and irregular in their attendance in Parliament.

Matters appear to have been in this situation in Scotland, when James I. returning from his captivity, ascended the throne. Finding his power circumscribed by the Great Nobles, it was natural for him to court the lesser Barons, whose influence was no way dan-

gerous to him, and who being exposed to oppression from their powerful neighbours, would be disposed to seek his protection.

With this view was passed the act 1425, c. 52. ordaining, "That all prelates, erles, baronnes, and freeholders of the King within the realme, *sen they are balden to give presence in the King's parliament and general counsel*, fra thinctooth be halden to compeir in proper person, and not be a procuratour; but gif the procuratour alleage there and prove a lauchful cause of their absence."

This act, however, does not seem to have produced the desired effect. Many of the lesser Barons, either dreading the power of the Nobles, or conscious of their own want of importance, still withheld their attendance; and the King therefore resolved to try another experiment, and to accomplish his purpose by relieving them of personal attendance, upon condition of their sending representatives.

Accordingly this was attempted by the act 1427. c. 101; by which it would seem to have been intended to establish something similar to the House of Commons in England; for, after providing, that the *small baronnes and free tennentes*, need not cum to parliaments nor general counsels; swa that of ilk scherifdome there be send, chosen at the head-court of the scherifdome, twa or mae wise men, after the largeness of the scheriffdome," it goes on and says, "The quhilk fall be called *commissares of the schere*; and be thir commissares of all the schires fall be chosen an wise man and expert, called *the commoun speaker of the parliament*, the quhilk fall propone all and fundrie needis and causes *pertaining to the commounes* in the parliament or general counsel."

Here it seems plain, that the English House of Commons was in the King's view; and the act proceeds thus: "The quhilkis commissaries fall have full and haill power of all the laif of the scherifdome, under the witnessing of the schireffis seale, with the seales of diverse Baronnes of the schire, to hear, treete, and finallie to determine all causes to be proponed in Council or Parliament. The quhilkis commissaries and speakers fall have *costage* of them of ilk schire that awe compeirance in Parliament or Counsel; and of their rents, ilk pound fall be utheris fallow to the contribution of the said costes."

The act concludes with these words: "All Bishoppes, Abbotes, Priores, Dukes, Earles, Lordes of Parliament, and Banrentes, the quhilkis the King will, be received and summoned to Council and Parliament *be his special precept*."

The calling the Prelates and great Barons to Parliament by a *special precept* to each, had been introduced in England by the *Magna Charta* of King John, before the representation of counties was established; and James I. by the act 1427, adopted a similar form, even when attempting to introduce representation in Scotland; and it continued the same afterwards, because his endeavours to introduce representation proved ineffectual. This is the *first* Scots statute, in which the distinction between the *greater Barons* and *lesser Barons* is to be met with; and it fully shows, that besides ecclesiastics and the commissioners of burghs, the *only other* constituent members of Parliament were those

those who held lands of the Crown *in capite*. As to *Banrentes*, in place of being a class of persons *not* holding lands of the Crown *in capite*, but called *at the pleasure of the King*, they were, on the contrary, of the highest degree of *Great Barons and Lords of Parliament*, to be called by special precept; as is proved by Skene *de verb. signif.* under the word *Banrentes*; by Du Cange, in his Glossary, under the word *Bannereti*, and by Selden, *Titles of Honour*, part 2. c. 5. § 25. &c.

In this particular, of calling all the lesser Barons and freeholders by *edictal citation*, while the great Barons were to be called by *special precept*, this act of Parliament seems to have been carried into execution: But with regard to the introducing representation, and the forming the representatives of the lesser Barons into a separate body, with a *common Speaker*, which would seem to have been the two other objects in view, it does not appear that the statute ever took effect. That the intended representation of counties did not at all take place, is proved by the preamble to the statutes of the Parliament held 12th July 1428, to be found in the *Black Acts*, fol. 15. 17. 19.

The attempt thus made by the act 1427 having been unsuccessful, so thirty years thereafter, another method of obtaining the attendance of the lesser Barons was thought of in the reign of James II. and which was, to *constrain* none but freeholders, who held of the King a *twenty-pound land*, to come to Parliament, and to leave all holding under that sum, to come or not, as they pleased; and accordingly this was established by the act 1457, cap. 75.

Upon this statute, Sir George Mackenzie observes, "By this act no freeholder can be *forced* to come to Parliament, except he hold a twenty-pound land of the King; but none can be now compelled; and this was only in the time *when all freeholders were obliged to compare in Parliament, as the King's head-court.*"

That the constituent members of Parliament were *all those freeholders* who held immediately of the Crown, is likewise proved by the acts 1449, c. 26. and 1489, c. 16. By the former it was enacted, "That where regalities fall in the King's hands, the freeholders within the same shall compare in Parliaments and general councils, as the freeholders of the royalty do." By the latter it was enacted, "That free tenants who hold of the Prince, as Duke of Rothsay and Steward of Scotland, shall be holden to compare and answer in Parliament, until the King have a son to answer for them in Parliament." And upon this statute Sir George Mackenzie observes, "By this act it is ordained, That when there is no Prince, the vassals of the principality shall come to Parliament; and none can come to Parliament but such as hold of the King."

Nothing farther occurs in the statute-book till the act of James IV. 1503, c. 78. by which it was provided, That "Barons, freeholders, and vassals, whose lands are within the extent of 100 merks, should be exempted from personal attendance in Parliament, unless specially called by the King's writ, provided they send their procurators to answer for them." This act was meant as a favour to the *lesser Barons*, and to dispense with the attendance of *those* who held lands within 100 merks of new extent provided they sent a procurator to answer

answer for them; but with regard to such as held lands above that extent, the law was left to stand as it was before. James IV. lived in such friendship with his nobles, that he had no occasion to be solicitous about the attendance of the lesser vassals of the Crown in Parliament. He was disposed, therefore, to relieve from that burden those who were of inferior estates, leaving the obligation upon those above 100 merks of new extent, to be enforced by nothing farther than the old penalty.

While this act relieved such as were within 100 merks of new extent, from *personal* attendance, it was with this exception, *But gif it be that our Sovereine Lord write specially for them*; and in the former act 1457, there was an exception of the same kind: but it is a most erroneous idea to suppose from this, that the King had a power, at his pleasure, to call to parliament *any person* within his dominions, whether such person was or was not a baron or freeholder of the Crown *in capite*. The acts 1457 and 1503, in which this power was reserved to the King, were passed, in order to relieve the lesser vassals of the Crown from the *necessity* of attendance; and therefore the power of calling, here reserved, was only meant to apply to *those* whose *constant* presence was thus *dispensed with*: and it would have been adverse to the very idea of Parliament, as well as an insult to the dignity and privileges of those who sat there, to introduce amongst them any person who was not a tenant *in capite* of the Crown. See this well illustrated by Sir George Mackenzie, in his observations on this part of the act 1503.

To show still farther, that, beside prelates, lords of parliament, and commissioners of burghs, the only other constituent members of that assembly were the *libere tenentes*, or vassals of the Crown *in capite*, reference was made to the form of the act or ordinance made by the King as the warrant for the director of Chancery to issue out precepts or *briefes* for convening parliaments; copies of which are given by Lord Kames in his Essay on the Constitution of Parliament, p. 60. 61. Farther, it was stated, there was good reason to believe, that the constitution of parliament had been the same at a still more early period; *Stat. Rob. III. Pr.*; *Stat. prima, Rob. I. Pr.*; *Stat. Alex. II. c. 3. 4.*; *Fordun, lib. VIII. Sc. 73.* *Annals of Scotland, vol. I. p. 139.*

At the same time, without going farther back than the reign of James I. and taking a view of the statutes from that time down to the reign of James VI. it was submitted to be evident, that *no vassal of the Crown* was excluded from a seat in Parliament. On the contrary, *every* tenant of the Crown *in capite* was bound to give suit and presence in Parliament; and the several statutes that were enacted, instead of aiming at any exclusion of such as held immediately of the King, were passed either to enforce the attendance of *all*, or afterwards to relieve from the *constraint* or *necessity* of coming there, those who, from their inconsiderable property, were unable to bear that expence.

While such was the constitution of Parliament, it is utterly impossible to suppose, that the eldest son of any Lord of Parliament, or of any

any Baron whatever, if he himself held land immediately of the Crown, could be excluded from the right of giving suit and presence in the King's great council. On the contrary, it was *a duty incumbent on him*, by the very tenure upon which he held his lands; and there is not a single word in any of the statutes, nor in any of the writs for calling Parliaments, nor in any existing record or document, which can support such an exception.

Even if the matter was left to rest upon these general principles, the conclusion would be sufficiently certain; but, to go farther, there is, in the *next* place, unquestionable evidence, that the eldest sons of Peers, not only did come to Parliament, but sat there as constituent members, in virtue of their freeholds as vassals of the Crown.

During the reigns of James I. and James II. no rolls of Parliament are now extant. The first roll that has yet been discovered, is that of the Parliament which was held at Edinburgh upon the 12th October 1467, in the reign of James III.; it mentions, as present, 25 Ecclesiastics, 24 of the Nobility, and 12 lesser Barons. The next roll is that of the Parliament held 20th November 1469, at which there appear to have been present, 23 Ecclesiastics, 2 Officers of State, 33 of the Nobility, 21 lesser Barons, and 22 Commissioners of Burghs. Both these rolls, however, are incomplete, and bear at the end, *et quampluribus aliis*.

Besides these, there are rolls of most of the Parliaments held during this reign. In the Parliament 1471, there appear 30 Ecclesiastics, 29 of the Nobility, 10 lesser Barons, and 23 Commissioners for Burghs. In the Parliament 1471-2, there are 15 Churchmen, 20 of the Nobility, 34 lesser Barons, and 11 Commissioners for Burghs. In the Parliament 1476, there appear 17 Churchmen, 32 of the Nobility; but no lesser Barons nor Commissioners of Burghs are mentioned.

In the Parliament 1478, there appear 14 Churchmen, 14 of the Nobility, 7 lesser Barons, and 20 Commissioners of Burghs; and this is the first roll in which the names are set down in columns. It is very distinctly written in columns, first the *Bishops*, then the *Abbots*, then the *Comites et Barones*, then the *Domini Parliamenti*, next the *Barones*, and lastly the *Burgorum Commissarii*. In the class of the *Barones* are placed the *Magister de Halis* and the *Magister de Erskyn*. In the roll of the Parliament 1481 the names are not set down in columns; but amongst the *Barones* are placed the *Magister de Erskine* and the *Magister de Halis*.

Of the Parliament held 1481-2, the roll has the names set down in columns. There is one column with a common title for all the Barons. In this, after the *Domini*, there is a blank space; after which are placed the eldest sons of Peers; and immediately after them, without any blank space, the other lesser Barons. These eldest sons are, the *Magister Crawford*, *Magister Keith*, *Magister Morton*, *Magister Erskine*, *Magister Sommerville*.

In the roll of the Parliament 1484, there are three eldest sons of Peers, *Magister Crawford*, *Magister Erskine*, and *Magister Kilmaurs*.

In the Parliament 1484-5, in that held 1485, in that of 1487, and in that of 1487-8, there appear also some of the eldest sons of Peers.

Thus, in *nine* of the Parliaments held during the reign of James III. the rolls show eldest sons of Peers to have been present, and marked as constituent members; and of the other Parliaments held in this reign, the rolls of some of them are lost, and others incomplete.

The same thing appears from the rolls of the Parliaments held during succeeding reigns. Thus, during the reign of James IV. there appear to have been held *fourteen* Parliaments, of *seven* of which there are no rolls extant; and in the remaining *seven*, of which we have rolls, there are to be found eldest sons of Peers sitting in no fewer than *five* of them.

During the reign of James V. there appear to have been held *seventeen* Parliaments, of *five* of which no rolls are to be found; and of the remaining *twelve* which have rolls, there appear eldest sons of Peers in *five* of them. During the reign of Queen Mary, there appear to have been held *fourteen* Parliaments, of *four* of which there are *no* rolls; but in every one of those of which we have rolls, there are found the eldest sons of Peers.

Of the two first Parliaments of James VI. the first held 15th December 1567, and the other held 18th August 1568, the rolls have been only recently discovered, and they are found to contain the names of *four* eldest sons of Peers. From that time, down to the year 1587, there do not appear, in the rolls of Parliament, any eldest sons of Peers, nor indeed any *lesser Barons* whatever.

The attendance, or the neglect of attendance of the lesser Barons in Parliament, may be in a great measure explained, by taking a view of the situation and circumstances of each particular period.

During the turbulent and busy reign of James III. there is seldom a Parliament, in which the attendance of a considerable number of the lesser Barons does not occur. In times of public commotion, and when the spirit of opposition to the Crown rose to any considerable height, numbers of the lesser Barons came to Parliament, and probably were brought there, by the Nobles; for by that time, the King had perceived it of little consequence, to command the attendance of the lesser Barons, because he found that any resolution, though taken by the majority, could not be executed, if it opposed the will of the more powerful minority. The Commissioners of Burghs likewise appear to have attended in Parliament, during this reign, in considerable numbers, more especially after the act 1469, c. 29. obtained during the King's minority, and which changed the mode of electing the Magistrates and Council of Burghs, and thereby enabled the Nobles to acquire great power over them.

During the reign of James IV. there being no struggle between the King and his Nobles, few of the lesser Barons, and still fewer of the Representatives of Burghs, appear to have attended. Some of the eldest sons of Peers however, are, during this reign, to be found in every Parliament of which there remains any roll.

In the reign of James V. very few of the lesser Barons seem to have attended; although, when they did, we always find some eldest

eldest sons of Peers amongst them. In the rolls of several of these Parliaments, it would seem as if there had not been even a single lesser Baron present; but at the same time, there is some reason to suspect the accuracy of the rolls, because we find *lesser Barons* mentioned as members of the Committee of Articles, even when their names are not to be found in the roll. Few, likewise, of the Commissioners of Burghs seem to have attended; and indeed it was not in *Parliament* that there was any struggle at this period. It was in the field; It was in the camp at Fala; in the after refusal to march into England; and, finally, in the rout at Solway Moss, that the Nobles, too fatally, convinced the King of their power and independence.

In every one of the Parliaments of Queen Mary of which rolls remain, there appear several of the eldest sons of Peers, but very few of the other lesser Barons, and few of the Commissioners of Burghs. The Reformation had now begun to make considerable progress in Scotland; but matters were not yet ripe for bringing it into Parliament. This did not happen till 1560, when there came upwards of an hundred lesser Barons, and a considerable number of the Representatives of Burghs.

From the circumstances already explained, the lesser Barons had, in a great measure, neglected and given up attendance in Parliament; but it required only some extraordinary conjuncture to rouse them from their inactivity. Whenever such presented itself, they were ready to stand forth; and a remarkable instance of this had already occurred in the year 1555, when Mary of Guise, the Queen Regent, having proposed in Parliament to register the value of lands throughout the kingdom, to impose on them a small tax, and to apply that revenue towards maintaining a body of regular troops in constant pay, about 300 of the lesser Barons immediately assembled, remonstrated with the most determined boldness, and, alarmed at this, the Regent prudently abandoned her scheme. *Buchanan. Hist. lib. xvi. c. 8.*

The lesser Barons had so long neglected their attendance, that when they came in such numbers to the well-known Convention Parliament in August 1560, they thought it necessary to present a petition, asserting their ancient right, and praying that *their advice, counsel, and vote should be taken*; and this act *passed without contradiction*. *Robertson's Hist. App. N° 4.*

Whatever the circumstances were, which had made the lesser Barons neglect coming to Parliament, the rolls afford full evidence, that frequently at least a few of them were present; and in particular, upon many occasions, some of the eldest sons of Peers. And, together with the great number of these instances vouched by the rolls of Parliament, there are several examples of their sitting in Conventions of the Estates; between which and Parliaments there does not seem to have been much distinction. *Sir George Mackenzie, Observ. p. 302. Spottiswoode, Hist. p. 509, 510.*

It had been said, that upon all these occasions the eldest sons of Peers attended in Parliaments or Conventions, not in their own right,

as holding lands immediately of the Crown, but as *proxies* for their fathers, or as summoned by *special precept* from the King, in virtue of the power reserved to him by the statutes 1457 and 1503. Both these suppositions however, it is easy to show, were without any foundation.

As to their sitting as *proxies* for their fathers, this is completely refuted by the rolls, which furnish clear evidence of *the father and the son sitting together in Parliament* at one and the same time. Of this a number of instances were given; and farther, it was remarked, that whenever any person appeared as *proxy* for another, he was set down as such in the roll of Parliament; whereas these *Magistri*, whether eldest sons, or heirs apparent of Peers, were evidently set down as sitting there in their own right, without the addition of *proxy*, and are placed amongst the lesser Barons.

As to their having been called by *special precept* from the King, it was remarked in the *first* place, That if there had been only a few instances of the eldest son of a Peer being found in Parliament, there might be some pretence for supposing its having been occasioned by some unusual cause; but when there are such a variety of instances, in so many different Parliaments, in so many different reigns, and frequently also *during the minority of our Kings*, it must be impossible to account for this in any other way, than by holding, that they came there in virtue of *their own right*, as possessed of lands holding immediately of the Crown. In the *second* place, it has been fully shown, That in virtue of the power reserved by the Acts 1457 and 1503, the King could, by *special precept*, call *those only* who, by being immediate vassals of the Crown, had not merely a right, but were bound to attend in Parliament.

And in the *third* place, Evidence was produced to show that these *Magistri*, prior to the time of their appearing in Parliament, were actually possessed of estates belonging to them *in their own right*, and giving them therefore an unquestionable title to sit in Parliament. See *Lord Kames's Essays, Brit. Antiq.* p. 98.

The *second* branch respects the period between 1587 and the treaty of Union in 1707; and under this head, the first thing which occurs, is the well-known statute 1587, c. 114. in which there certainly is not a single word that even points at placing the eldest sons of Peers in a different situation from what they were before. If, when possessing lands as vassals of the Crown, they had a *right* to sit in Parliament before this time, there does not occur any thing in the Act taking away *that right*, or putting them in a worse condition. Indeed it specially refers to, and revives the prior Act 1427: and as it has been clearly shown, that the said Act 1427 did not diminish their right, but that, on the contrary, they enjoyed and exercised it from that time downwards; so neither can it be supposed, that the statute now in question meant to make the smallest change.

This statute directs a precept forth of the Chancery, to convene *the Freeholders* for choosing Commissioners, as is contained in the same Act 1427. It ordains *all Freeholders of the King, under the degree of Prelates and Lords of Parliament*, to be present at the choosing of the
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said Commissioners. It ordains *all Freeholders* to be taxed for the expence of the Commissioners; and it provides, that the compearance of the said Commissioners *shall relieve the baill remanent Freeholders and small Barons of the said Schires of their suits and presence aucht in the said Parliaments*. Thus, there is not only a most exprefs reference to the Act 1427, but in every part, there is constant mention made of *all Freeholders* under the decree of Prelates and Lords of Parliament, without any other distinction or exception whatever. That the eldest son of any Baron, whether greater or lesser, did not come under the description of a Prelate or Lord of Parliament, is indisputably clear; and therefore, when holding lands in their own right immediately of the Crown, they assuredly fell under the denomination of *Freeholders of the King*, as expressed in this statute. Indeed it is utterly inconceivable, that there could have been any purpose or intention of excepting them; and if there *had*, surely, in place of being left to implication, it would have been expressed in terms the most explicit and unambiguous. It neither was the interest, nor could it be the view of the young King, then hardly of age, to irritate a powerful Nobility, by encroaching upon the *then acknowledged rights of their eldest sons*; and therefore, the idea of excluding them, has as little support from probability, as it has any foundation in the words of the Act of Parliament.

It is remarkable, that a statute deemed so important with respect to the constitution of the Scots Parliament, is scarcely mentioned by the historians who wrote near that period. Neither *Calderwood* nor *Johnston* take any notice of it whatever; and even Archbishop *Spottiswoode* speaks of it in the slightest manner. Indeed, it is not a little singular, that the King himself, in his *Basilicon Doron*, written but a few years afterwards, and wherein he speaks fully of the Scottish Parliament, takes no notice whatever of the change introduced by this statute. The truth seems to be, that the act was the result of an application from the *lesser Barons*, to be relieved of their obligation of attendance in Parliament, upon their observing *certain promises and conditions made to his Majesty*, which could be no other than their engaging to send Commissioners, and to bear their expence: And if this was the case, there seem to be grounds for believing, that the Act proceeded less from any views of policy in the King, than from a proposition *on the part of the lesser Barons*, to obtain, upon these terms, relief from a burden which, by law, might otherwise be imposed on them.

The next statute is the Act 1661 c. 35, concerning the persons entitled to elect and be elected Commissioners of Shires to Parliament; and which enacts that *all Heritors* holding of the King, and whose yearly rent amounts to 10 chalders of victual, or L. 1000 *Scots*, shall be capable of electing and of being elected, *excepting always all Noblemen and their vassals*. What persons the Legislature here comprehended under the word *Noblemen*, is fully explained by two unprinted Acts, passed in 1662. The one is an Act *for settling the orders of the Parliament House*; and it expressly distinguishes between *Noblemen* themselves on the one hand, and their *eldest sons and appearand airs-male* on the other, and assigns a separate place for these last; while the *Noblemen* themselves

have the benches appropriated to them and the Archbishops and Bishops. In like manner, the other Act, which regards enforcing attendance, mentions the penalty upon a *Nobleman* as being a constituent *member of Parliament*, and could not possibly comprehend any others but those who, in virtue of being actually Peers at the time, had a seat in that Assembly. In short, the term *Noblemen* is used as synonymous to *Lords of Parliament*; and the *eldest sons of Noblemen* are mentioned as altogether a different order.

With regard to the Act 1681, c. 21. it, like all the former, is perfectly general and comprehensive; and by declaring, that none shall have a right to vote but those possessing a 40 shilling land of old extent, or L. 400 of valued rent, it equally declares, that *all those shall* have a vote who *are* possessed of such qualifications. It may likewise be remarked, that the Act contains various restrictions and exceptions, particularly relating to the objection of *minority*; and had it then been supposed or understood, that the circumstance of being the eldest son of a Peer, formed any objection, there cannot be a doubt, that it would have been carefully mentioned by the Legislature. This statute, therefore, instead of excluding, clearly comprehends the eldest sons of Peers possessing the qualifications thereby required; for it confers the right of voting upon *all* Freeholders of a certain extent of property, without any such exception.

From this time down to the Union, there is no statute making any variation, either with regard to the rights of those intitled to be elected, or intitled to vote, in the election of members to the Parliament of Scotland. And after this review of the statutes, if it shall be said that the right, which it must be acknowledged the eldest sons of Peers *did* once possess, *was taken away by law*, let these Objectors point out that law, or that statute, which imposed so unjust and so severe a forfeiture; let them explain those circumstances which could warrant such a deprivation; and let them say by what authority, and at what period, that right was taken away. Mere assertion, unsupported by evidence, will not be listened to; and the statutes, in place of furnishing any aid to their plea, afford the most satisfactory proofs, that it was neither the intention nor the view of the Legislature, to strip the eldest sons of Peers of their right, nor to place them in a worse situation than any other vassals of the Crown.

In the *next* place, with regard to the usage and practice during this period, it having been alledged, that there is no instance of a Peer's eldest son being elected into Parliament; so it is, in the *first* place, to be considered, How far there is any sufficient evidence of this alledged *disuse*; and in the *second* place, How far that *disuse* can be reasonably accounted for, so as to exclude any supposition of the right itself having been *taken away*.

As to the fact, it, in the *first* place, merits attention, that although, from 1587 to 1612, there were no fewer than *seven* Parliaments held by James VI. yet the *whole rolls* of these Parliaments are lost. During the remainder of this reign, only *three* Parliaments were held, one in 1612, another in 1617, and a third in 1621. Of these, the rolls
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still remain; and there is not mentioned in them the name of any of the eldest sons of Peers.

During the reign of Charles I. there is extant only the roll of the Parliament held 18th June 1633. The Parliaments 1638 and 1640 were *called* indeed by Royal authority; but the whole acts passed in them were, at the Restoration, rescinded, and no rolls nor minutes of their proceedings remain. Another Parliament was called in 1644, and continued by different sessions till 1646; and in 1648, a Parliament was held, of which there were three sessions, held in that and the following year 1649; but these Parliaments met *without Royal authority*, and no rolls nor record of their proceedings remain.

In the reign of Charles II. three Parliaments were held, one in 1661, another in 1669, and a third in 1681. Of the *first* of these there were three sessions, one in 1661, another in 1662, and a third in 1663; of the *second*, there were four sessions, one in 1669, another in 1670, a third in 1672, and a fourth in 1673; of the *third*, held in 1681, there was only one session. There were also *three* Conventions of Estates, one held in 1665, another in 1667, and a third in 1678; and of all these Parliaments and Conventions the rolls remain.

In the reign of James VII. there was only *one* Parliament, of which there were two sessions, the one in 1685, and the other in 1686.

During the reign of William and Mary, the Convention of Estates held upon 14th March 1689, was upon 5th June that year declared a Parliament. It was continued for no fewer than *ten* different sessions, and till after the accession of Queen Anne.

In 1703, Queen Anne called a *new Parliament*, which met 6th May that year, held a *second* session 16th July 1704, a *third* session 18th June 1705, and a *fourth* session 3d October 1706. This Parliament concluded the treaty of Union, and was *the last Parliament of Scotland*. Of all these Parliaments the rolls remain, and no eldest son of a Peer occurs in them.

Thus, from the period of the *Restoration* down to that of the *Union*, there were no more than *six* Parliaments, only *three* in the reign of Charles II. only *one* in the reign of James, only *one* in the reign of William, and only *one* in the reign of Queen Anne. Although therefore the rolls of these Parliaments remain, and contain not the name of any Peer's eldest son, yet it will be kept in view, that there were only *six general elections*; and with regard to the period before the Restoration, it has been already shewn, that the rolls of only *four* of the Parliaments remain; the rolls of all the other *twelve* Parliaments which were held during that period, being now lost. In short, during a period of no less than *one hundred and twenty years*, which passed between 1587 and 1707, although there were *twenty-one* Parliaments, yet the rolls of only *ten* of them are extant at the present day. And when it thus appears that *more than one half* of the rolls of the Parliaments held during this long period are now lost, it will be considered, whether the circumstance of the name of no Peer's eldest son being found in those *that remain*, can be held sufficient to prove, that during all that period they never once exercised their right.

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But, in the *next* place, when it is considered, that there is no evidence of the right itself *being taken away*; so, unless the contrary should be clearly shewn throughout every part of this long period, the presumption should rather be, that they *did* exercise that right, and that their not happening to appear in the rolls which remain, has been occasioned by other causes than any abandonment, or any forfeiture of their right. And there are a variety of circumstances which may serve to account for the neglect of the exercise of their right.

The ideas and the motives of men must be measured by the times in which they lived, and by the circumstances in which they were placed. Various circumstances in the ancient situation and constitution of Parliament, naturally contributed to dispose the *lesser Barons* to view attendance upon it as a burden, which, on the other hand, there was no advantage to compensate. In a martial age, when military enterprises were the chief occupation, the civil transactions of Parliament were little interesting. Taxes were then almost unknown, and the framing of any laws or regulations respecting property and civil rights, were left almost entirely to the Ecclesiastics. Even the great Barons attended, more from its being a *service*, which they owed to the King as their feudal superior, and a duty which it became their own dignity to perform, than from any share which they took in the *ordinary* business that might occur. And it need not be wondered at, therefore, that the inferior vassals of the Crown should deem it a hardship to be obliged to attend an Assembly, in the usual proceedings of which they were so little interested, and where they felt themselves to be of so little importance.

This was very nearly the state of Parliament, from the time when James I. ascended the Throne in 1424, till the period of the Reformation in the reign of Queen Mary. During a turbulent reign, or during some public commotion, the lesser Barons might be excited, and brought to come to Parliament, in unusual numbers; but excepting upon such extraordinary conjunctures, they were glad to decline that burden, and anxious to obtain an exemption from it. Even in the reign of James III. the number of lesser Barons in Parliament never exceeded *thirty-four*; in the reign of James IV. their number never exceeded *fifteen*; and in the reigns of James V. and Queen Mary, they never exceeded *seven*, and *these* almost entirely the eldest sons of Peers.

Gradually, however, the alienation of property operated a considerable change. The exorbitant estates of the great Barons came, in progress of time, to be shared out into more hands; and the lesser Barons multiplying greatly in number, soon advanced into a more respectable situation. Still, however, there were circumstances peculiar to the situation and constitution of the Scottish Parliament, which prevented them from viewing their presence in that Assembly as of any importance, and which constantly led them to consider their attendance as a grievance to be shunned, rather than a privilege which they should wish for, and court opportunities of exercising.

In the *first* place, The Committee distinguished by the name of *Lords of the Articles*, was peculiar to the Parliament of Scotland, and
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had very signal effects upon its constitution. It put it in the power of the King to control Parliament, and necessarily precluded all deliberation and freedom of debate. See *Kames's Ess. Brit. Antiq.* p. 51.

In the *second* place, The *short time* which Parliament continued to sit, is another circumstance meriting attention, and it chiefly arose from that very institution of the Lords of the Articles, upon whom the whole load of the business was devolved; so that the Parliament met the first day to choose that committee, and having then adjourned, usually met again only on the last day, to receive and to vote what were called the *conclusions* of the Lords of the Articles, after which they separated. *Bishop Burnet's Hist. own times*, vol. 1. p. 115. *fol. edit.* See also *Calderwood's Hist.* p. 730. 731. &c. which furnishes a most striking picture of the situation of the Parliament of Scotland.

In the *third* place, The Parliament of Scotland consisted only of *one House*, in which the whole Estates assembled together, held their deliberations in common, and voted promiscuously, each individual member being intitled to an equal voice. No circumstance, perhaps, contributed more to exalt the importance of the Parliament of England, than that of its being divided into *two Houses*. The union of the Representatives from Counties with the Representatives from Burghs, formed a distinct order in the State, and their separation from the Spiritual and Temporal Lords, drew after it the most signal consequences, and may justly be deemed the chief cause of the high authority of the English House of Commons. In Scotland again, they assembled together *in one House*, and the Commons acquired none of those privileges which would have been the result of a separation, and which gave such importance and authority to the same order of men in the neighbouring kingdom.

A *fourth* circumstance, which contributed to keep the Representatives of the Commons of Scotland in a low and dependent condition, was the vast accession of power, which the King derived from his succeeding to the English Throne. This, while it gave him great authority with his Nobles, necessarily increased his influence in Parliament; and against a powerful Prince and his proud Nobles, the *small Barons* could be of little account. Even before his accession to the Crown of England, James held the small Barons of no consequence. See *King James's works*, p. 162, 163. After the reign of James, and about the middle of the last century, the Commons of Scotland rose into some greater consideration; but still they were of little consequence in Parliament till after the Revolution; and the interval between that period and the Union, was of too short duration, to afford sufficient opportunity, for letting the Commons feel their consequence, and establish their independence.

In the *fifth* place, Till after the Revolution, few taxes were imposed by the Parliament of Scotland. It was the power of *taxation* that in England *first* gave importance to the Representatives of the people; and it is the important privilege of granting or of refusing supplies, which at the present day maintains the independence of the House of Commons, and is the true *palladium* of our excellent constitution. In Scotland, the parliamentary taxes were so few, as well as so light

and inconsiderable, that it may easily be conceived how little the nation would *upon that account* be excited to resist the authority of the Crown, or be engaged to give attendance in Parliament. See *Sinclair's Hist. Pub. Rev. Part III.*

These various circumstances exhibit too faithful a picture of the condition of our Parliament, from the Union of the Crowns to the period of the Revolution. A Monarch possessed of exorbitant power; a proud and numerous, but corrupt Nobility; and *small Barons* of mean fortune, with Representatives for Burghs, where arts and commerce were hardly known, and had not yet given birth to wealth and independence. These, in one joint body, formed the Estates of Parliament, where the King, by his own power, and by the Lords of the Articles, had almost boundless influence. Their sittings were short; the business being already prepared, was voted with dispatch; and no freedom of debate, nor time for deliberation, were allowed. Such were our Parliaments: And the Commons, oppressed equally by the arbitrary severity of the Government, and by the power of the Nobles, sunk into the most abject despair; and had it not been that religious zeal kept alive the flame, every spark of civil liberty must have suffered a total extinction.

In the *ancient* Parliaments of Scotland before the Reformation, to distinguish themselves in the Court, and in the Councils of their Sovereign, equally suited the rank, and became the dignity of the eldest sons of the Nobles. To be in his Court, was the necessary consequence of their birth and fashion; and when they held lands as his immediate vassals, to sit in his Parliaments was what they owed to him of right. They sat there with those to whom they were equal in blood, and to whom they were nearly equal in rank; for few of inferior condition attended; and they came there, not sent by, nor at the charge of others, but of themselves, and at their own expence.

But after *representation* was established, and after large estates had, by frequent partitions, been dealt out into many small parcels amongst the *lesser Barons*, to be the delegated deputies and hired messengers of such inferior persons, could but ill besit the gallant sons of proud and independent Nobles. *They* would not deign even to submit to the burden; for, as a *burden*, and not as a privilege, it was considered. It was a trust from which no profit nor honour was to be derived, and consequently was every where shunned, in place of being courted. When afterwards the Commons, in progress of time, rose to some greater importance, the power of the Crown, and the peculiar constitution of Parliament, still checked their advancement, and rendered them of little or no account in that Assembly. If they discovered any ardour for freedom, it was quickly repressed; and in a tyrannical Government, and an enslaved Parliament, there was nothing that could allure the eldest son of a Peer to claim his right to be a Representative of the people. No wonder, then, that during this period we do not discover them sitting in that Assembly, where, in place of having any opportunity of displaying abilities, all freedom was banished, and every symptom of a spirit of liberty, crushed by the strong hand of arbitrary power.

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Thus the right of the eldest sons of Peers had not been *taken from them*, but they had forborne to use it, while they deemed it of little value. The long neglect of the right, however, seems to have produced a notion, that any pretensions to it were relinquished; and there is little wonder that such an idea should have come to be eagerly cherished by a people irritated by manifold oppressions from an arbitrary Government and a powerful Aristocracy. It was an erroneous notion, but it had come to prevail; and in this situation were the minds of men in this country, at the accession of James VII. in 1685, and when new oppressions were dreaded from the known disposition of that bigotted and infatuated Prince.

Upon 23d April 1685, the first and only Parliament of James was held at Edinburgh, and Sir George Mackenzie of Tarbat, who was Clerk-Register, and who had gone to London upon the accession of the King, came down, intrusted with his Majesty's instructions for managing the Parliament, and honoured with a patent of peerage, creating him *Viscount of Tarbat*. The character and history of this Noble Lord are well known. In 1681 he was high in trust and favour with the Duke of York, when Commissioner to the Parliament of Scotland; and he was not only a chief promoter, but defended, with indecent keenness, all the violent and illegal proceedings of that tyrannical administration. He became, upon this account, deservedly unpopular, and obnoxious to the Nation, who were now still farther provoked at seeing him advanced to honours by their new Sovereign, and sent down to lead on a prostitute Parliament to the most unprincipled measures, and to a total resignation of their liberties both civil and religious.

It happened, that before being advanced to the peerage, his eldest son had been elected one of the Representatives to Parliament from the county of Ross; and it naturally occurred, as a very difficult and delicate matter, in what way the Viscount of Tarbat should act upon this occasion. It was not a time for urging an unpopular topic, nor was that of the son of a hated and obnoxious minister of the Crown the case in which the question could be expected to be discussed and tried with any fairness and candour; and, in short, having no alternative, but either to try the question, or to withdraw his son from Parliament, he wisely chose the latter; and accordingly, upon 23d April 1685, the very *first* day of the session, there appears a short minute, by which warrant was given to the freeholders of the shire of Ross to meet and elect another Representative, "in respect the Viscount of Tarbat's eldest son, by reason that his father is now *nobilitate*, cannot now represent that shire."

That this is the true account of the case of *Tarbat*, receives the strongest confirmation from what afterwards happened in the Convention Parliament 1689, in the question between William Higgins, and the Lord Livingston, eldest son of the Earl of Linlithgow, with regard to the election of the Burgh of Linlithgow. The clerk of that Burgh, having given a Commission to Lord Livingston as duly elected; Mr Higgins complained of this, and offered a memorial in his behalf, which was remitted to the Committee for elections.

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In this memorial for Mr Higgins there is not the least mention whatever, of there being any objection against Lord Livingston *upon account of his being the eldest son of a Peer* ; but on the contrary, it enters into a very full and anxious investigation, as to the numbers and validity of the different votes, in order to show that Higgins carried his election by a clear and decided majority. Had it been understood, that his being the eldest son of a Peer, rendered Lord Livingston incapable of being elected, or that the case of Tarbat in 1685 had been a fair decision of that question, it is impossible to believe that this could have been forgot so recently after as the year 1689, or that the Committee would have gone any farther, than to rest upon that *conclusive* objection, or that they would ever have entered upon the other branch of the cause, respecting the legality and validity of the particular votes. Instead of this however, the Committee, although they did not choose to overlook altogether that *popular* objection, yet, not inclining to trust *to that alone*, they added, in the *second* place, “ in respect William Higgins was more legally and formally elected by the plurality of the votes of the Burgesses.”

All this is strongly confirmed by what passed in the Parliament of Scotland at the important period of the treaty of Union in 1707, only *eighteen years* after the case of Livingston, and only *twenty-two years* after that of Tarbat, and when these transactions must have been in the remembrance of many members of the House.

Upon 24th January 1707, when the fixing the number of Representatives from the Shires and Burghs of Scotland was taken into consideration, a clause was *proposed*, “ That no Peer, nor the eldest son of any Peer, can be chosen to represent either Shire or Burgh in this part of the United Kingdoms, in the House of Commons.”

This clause came *not* from those who affirmed the right of the eldest sons of Peers, but from those who were desirous to have them excluded ; and had they already stood excluded by law, there could have been no necessity for any such clause ; but, on the contrary, an opposite clause would have come from the other side, to the effect of *making* them eligible. No such motion however was made, because their *right* was held to be good, and it was therefore sufficient to *prevent* a clause that would *now* exclude them, and to leave their right to stand upon its former footing. In consequence of this, a clause to that purpose was opposed to that which had been *moved for*, and was accordingly *carried* by a majority of 14, the numbers being 86 for the *second* clause against 72 for the *first*.

If it had been *then law*, that the eldest sons of Peers were *not eligible*, and that the cases of Tarbat and of Livingston had been *founded in law*, it would have been an extraordinary circumstance to have found a *majority* of the Scottish Parliament, and amongst these the Lord Chancellor, as well as many of the most respectable and eminent men of the country, presuming *openly and avowedly to contest and to resist* a proposition warranted by law, and confirmed by two recent precedents of the High Court of Parliament. It is more reasonable to presume, that the *movers* and supporters of the clause which was *rejected*, were actuated by *popular* opinion, and by notions of *political expediency*, rather than by any cool
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and dispassionate judgement of the *legal merits* of the question; and indeed this is confirmed by *Defoe*, in his *History of the Union*, p. 212.

That the clause which actually *carried*, was understood by the Peers to be in effect a *declaration* of the *eligibility* of their eldest sons, is demonstrated by what happened immediately after the Union; for, upon occasion of the general election for the Parliament called by Queen Anne in 1708, no fewer than *eight* eldest sons of Peers offered themselves as candidates for Counties and Burghs in Scotland; and such a number starting so immediately after, seems to afford irresistible proof of the sense in which the clause in the treaty of Union had been understood.

By the act 1707, settling the manner of electing the 16 Peers and 45 Commoners for Scotland, it was enacted, "That none shall be capable to elect, or be elected, to represent a Shire or Burgh in the Parliament of Great Britain, for this part of the united kingdom, except such as are *now* capable, *by the laws of this kingdom*, to elect or to be elected as Commissioners for Shires or Burghs to the Parliament of Scotland."

This act was solemnly declared to be of the same force and effect as if it had been engrossed in the treaty of Union itself; and it is the clause just now recited which must guide the determination of the present question. The law of Scotland is to be considered *as it then stood*. We are to pay *that* regard to the minute in the case of Tarbat, and to the report of the Committee in the case of Livingston, which would have been due to them *at that time*; and because they happen to be now *four score years old*, we are not to give them any farther credit upon that account. Even when these cases were but recent, they had no weight with a decided majority of the *Union Parliament*; and surely we cannot pay more regard to them *at this day*, than was given to them *then*, by those who were best acquainted with them, and had the most indubitable access to know by what authority, or by what private views they had been occasioned, and upon what grounds *in law* they had been founded.

As to the argument founded upon *Disuse*, there are to be considered, *1mo*, The evidence of the alledged fact; *2do*, The *legal* effect of that fact; and, *3tio*, viewing it as any *presumption* of the right having been legally *taken away*, How far the *Disuse* can be accounted for, so as to exclude any supposition of that kind. The *first* and the *last* of these have been already considered, and it remains only to say a few words as to the *second*.

By the law of Scotland, there is no doubt that certain private rights may, *non utendo*, be lost by the *Negative Prescription*; but at the same time these must be rights in which *two parties* are interested, and where, while the one loses his claim, the other obtains an immunity from it. In all cases, however, where the *right* is of a different kind, and concerns the privileged person only, without *directly* affecting others, or, in other words, when it is what is termed *Res meræ facultatis*, no lapse of time can diminish or take away the right. This principle is well explained by *Lord Kames* in his *Elucidations*, art. 33. p. 248. See also *Mr Erskine*, book 1. tit. 1. § 46.

In England, there have occurred many instances of Burghs claiming and being allowed to send Members to Parliament, although they had neglected to exercise that right for a very long course of years. The Burgh of *Ashburton* in Devonshire, made its first election and return of Burgesses 27th Edward I. in the year 1299; but thereafter neglected their right till 8th Henry V. in the year 1420, when they again returned Burgesses, after a disuse of 120 years. The Burghs of *Agmondesham*, of *Wendover*, and of *Great Marlow*, did each of them repeatedly send Representatives to Parliament before 3d Edward II. but thereafter discontinued to exercise their right for no less than *four hundred years*; and after this, they were, upon their petition, anno 21. *Jac. I.* admitted to their right. The Burgh of *Cockermouth* sent Burgesses anno 23d Edw. I. but thereafter sent none till the year 1640, in the reign of Charles I.; *Prynne's Brev. Parl. Rediv. p. 225, 226, &c. Willis Notitia, Parl. Pref. p. 15.*

In Scotland, the greater part of the lesser Barons had so long neglected their right of coming to Parliament, that when, in 1560, they came to claim their seats, they deemed it necessary to present a petition to the Peers, asserting their ancient right, and desiring to be admitted; and accordingly the justice of their claim was acknowledged, and they were received, as Randolph expresses it, without any contradiction. The County of Kinross had, for a long course of years, neglected to send a Representative to Parliament; but in 1681 they resumed their right, and their Commissioner was immediately admitted; *Wight's Elect. Law, p. 468.*

The eldest sons of the Peers of England had so very long neglected their right of sitting in Parliament, that, in 1549, it seems to have occurred as a doubt, how far Sir Francis Russell, upon his father becoming Earl of Bedford, could continue to sit; but the Commons determined that he should *abide in the House, in the state he was before*; *Hatsell's Preced. p. 12, 13.* There is reason to believe, that, after anciently exercising their right, the eldest sons of Peers had come to neglect it, when sitting in the House of Commons was yet of little value; but by the year 1549, the Commons had come to be of considerable importance; *See Prynne's Brev. Parl. Rediv. p. 23, 48, 58, &c.*

If the evidence and the arguments which have been stated, would, in the year 1707, have been sufficient to establish the right of the eldest sons of Peers, it may with safety be affirmed, that *since that period* there has nothing passed which can take away *that right*, nor which can be allowed to weigh with a court of law in determining the question. There has occurred, neither any statute, nor any decision of a *Court of Law*, precluding the eldest sons of Peers from their right; and with regard to the vote or resolution of the House of Commons in 1708, it was attended with circumstances extremely peculiar. If the question had been discussed with dispassionate candour, and if the evidence which the present investigation has brought to light, had been then laid before that Honourable House, there is little doubt that the resolution would have been the *Reverse* of what it was.

It has been already mentioned, that, at the general election after the Union, no fewer than *eight* eldest sons of Peers offered themselves

as candidates for counties and districts of burghs in Scotland. Of these, *four* were successful; and being returned Members, petitions against the returns were presented. In these petitions, it is remarkable that not a law was pointed out, nor even alledged against the right of the eldest sons of Peers, nor any evidence either offered, or so much as alluded to, excepting the suspicious entry in the case of Tarbat in 1685, and the very dubious report of the committee in the case of Livingston in 1689. Indeed, the petitioners, upon that occasion, sufficiently knew the prejudices *then* generally entertained against the Nobility of Scotland; and they trusted, therefore, more to their cry against the *Scottish Aristocracy*, than to any *legal* and solid arguments which they could advance; *Chandler's Deb. vol. iv. p. 103.*

At that time, the Union had produced the most serious discontents in Scotland, and this encouraged the friends of the exiled family to make an attempt for recovering the throne. With this view, an invasion was threatened; and accordingly the French fleet, with the Son of the Pretender on board, together with 5000 soldiers, and a great quantity of arms, did actually sail from Dunkirk, upon 6th March 1708, for the coast of Scotland, with a design to make a landing in the frith of Forth. This armament soon reached the frith; and, had the Son of the Pretender, with the force which accompanied him, been landed, it might have been attended with the most serious consequences: for, the Nobles and Gentry ready to support his cause, were numerous and powerful; and the people, partly from attachment to the exiled family, partly from resentment at the Union, were every where impatient to rise in arms. And, after possessing himself of Scotland, the concerted plan was, that the Pretender should, with a numerous army, immediately invade England.

Together with all this, Scotland was, at that time, almost without troops, and in a very defenceless condition; but notwithstanding all these circumstances, it fortunately happened, that the enterprise did not succeed. The French fleet returned to Dunkirk, without making any landing in Scotland; and soon after, a new Parliament was called, and which met in the middle of November 1708. Bishop Burnet says, *the just fears, and visible dangers, to which the attempt of the Invasion had exposed the Nation, produced very good effects, for the elections did, for the most part, fall on men well affected to the Government, and zealously set against the Pretender. Bp Burnett, Hist. Own Times, vol. 5. p. 997, and vol. 6. p. 1026.*

Such was the state of matters in the end of the year 1708; and when *such* was the situation of Scotland, and so many of the Nobles known to be in correspondence with the Court of St Germain's, it may easily be judged, how far, *at that time*, the question as to the rights of their eldest sons, could be discussed with candour and coolness, in a House filled with *Whigs*, and under a *Whig administration*.

Bishop Burnet says, " Things went on in both Houses according to the directions given at Court; for, the Court being now joined with the *Whigs*, they had a clear majority in every thing: *All elections were judged in favours of Whigs and Courtiers*, but with so
" much

“ *much partiality*, that those who had formerly made loud complaints
 “ of the injustice of the Tories, in determining Elections when they
 “ were a majority, *were not so much as out of countenance when they*
 “ *were reproached for the same thing*. They pretended they were in a
 “ *state of war with the Tories*; so that it was reasonable to retaliate
 “ this to them, on the account of their former proceedings: *But*
 “ *this did not satisfy just and upright men*, who would not do to
 “ others that which they had complained of, when it was done to
 “ them or to their friends.” *Hist. Own Times*, vol. 6. p. 1026, 1027.

Such was the complexion of *this* Parliament, and such the view in which *their* proceedings, regarding election-questions, were held, even by those of the *Whig* Party who lived *at the time*, and were disposed to look on their measures with a friendly, and even a partial eye.

Indeed, in general, much cannot be said in favour of the determination in election-causes, before the late institution of Committees under Mr Grenville's act. A respectable author says, *every principle of decency and justice was notoriously and openly prostituted*, Hatfield's P. recd. p. 13. And indeed such an Assembly, from its very constitution, must necessarily be unfit for deliberately investigating and candidly determining questions of right, especially when attended with any intricacy and nicety. Party influence, political prejudices, and various other circumstances, are ever apt to interfere; and if superadded to these, there occur some peculiar situation at the time, agitating the passions of men, and exciting a national alarm, the vote of such an Assembly, *in cases where these can operate*, must not be intitled to much authority or respect.

The resolution of either House of Parliament, however it may determine the case of the particular individual before them, *cannot make law*, and much less a resolution passed at such a period, and when the House neither were, nor could be possessed of that evidence, and of those grounds, upon which to form a judgement, that later researches and more diligent investigations have since brought to light. Similar to this resolution in the House of Commons in 1708, there passed, not long afterwards, in the House of Lords, the well-known resolution with regard to the title of Duke of Brandon, then conferred by the Queen upon the Duke of Hamilton. The same fears and jealousies having found their way into the House of Lords, had the effect of carrying this resolution: but, after a course of years, when all these prejudices and fears had subsided, and when able to judge with dispassionate calmness, that Most Honourable House did, with dignified and becoming candour, hear the question again, called the Twelve Judges of England to assist them, and, agreeable to the unanimous opinion of the Judges, gave their determination *in favour* of the claim of the Duke. And surely, if the resolution of the House of Lords in 1711 has been so justly disregarded, the resolution of the House of Commons in 1708 cannot be intitled to any greater weight.

As to the case of Lord Charles Douglas in 1755, or that of Lord Elcho in 1787, it is hardly necessary to say any thing; for they both
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passed without any inquiry or discussion, and were rested upon no other ground than the authority of the resolution 1708.

Upon the whole, from viewing the constitution and history of Parliament during the different periods above mentioned, it appears, with respect to the *first* period, that from the most ancient times, *every* vassal holding lands immediately of the Crown, had not only a right, but was expressly bound to give his attendance there. The very exceptions introduced by the Acts 1457 and 1503 confirm this, without there being the least idea of any exclusion of the eldest son of a Peer, providing he had the requisite qualification in lands. From all this, their right to sit there may be conclusively inferred; and to remove every doubt, there is farther invincible evidence of their having actually sat in Parliament, from as far back as any rolls are extant, down till after the accession of James VI.; and that they sat there in virtue of freeholds, which they possessed in their own right, is fully established by the record of charters.

If the complainer has been successful in showing this, it is not easy to suppose, that the eldest sons of Peers could be disfranchised of so honourable and valuable a privilege, without some express and solemn act of the Legislature; and yet, during all the *second* period, no such forfeiture of their right is to be discovered, either in the Act 1587, or in the Act 1669, or in that of 1681. On the contrary, the statutes do all and each of them clearly comprehend the eldest sons of Peers, under the just and legal description of *Freeholders* of the Crown, intitled to *elect* and to *be elected* Representatives to Parliament. And as to the alledged disuse during this period, it has been fully explained and accounted for in such a manner, as to show that their right was never taken away, but only neglected to be used when it was deemed of little value.

In short, the *right* remained perfectly entire at the period of the Union; and this was clearly the sense and understanding of the Parliament of Scotland in 1707, when they passed the act by which the present question is to be tried. They justly disregarded the cases of Tarbat and of Livingston: and if such was held the law in 1707, there surely has passed nothing since, that can possibly be suffered to affect it. The right must be held at the present day entire; and it only now remains, to restore their just rights to the eldest sons of the Nobles of this country, and to place *them* on an equal footing with those of the same rank in the other part of the island.

In answer to all this, it was contended on the part of the *Freeholders*, That although anciently, agreeable to the general plan of the feudal system which had been introduced into Scotland, every person who held his lands immediately of the Crown was bound to attend in Parliament; yet, even from the earliest times, there appears the dawn of a distinction between the Prelates and Nobles, and the ordinary *libere tenentes* or Freeholders, who came afterwards to be more particularly described under the appellation of the small Barons or Freeholders.

With regard to the Peers, or *Barones Majores*, it is well known, that in ancient times, all honours and dignities were annexed either to lands or to offices; and that earldoms and lordships in Scotland were for a

long time territorial, and passed with the lands erected into a *comitatus* or *dominium*, is indisputable. While matters remained in that state, it is not unreasonable to suppose, that the Peers gave their attendance in Parliament, not in respect of their dignities, but in consequence of their holding their earldoms or lordships immediately of the Crown: but although in those days they were not in that respect to be distinguished from other freeholders; yet after the introduction of personal honours or dignities independent of lands, which happened in *Scotland* at least as early as the reign of James I. a considerable alteration in the model of Parliament must of necessity have taken place.

The Sovereign could be under no obligation to confer such personal dignity except upon those who were possessed of landed property; but even supposing none to have been created Lords of Parliament who were not possessed of landed estates at the time, there is no ground for concluding, that the heirs were to be deprived, either of the title or of any of the privileges attending it, upon their disposing of the estate which their ancestor held when he was ennobled. Those who were in this situation, would therefore sit in virtue of their personal honours alone; and hence all the other Peers, although their dignities were at first territorial, would in time come to be blended with the Lords of Parliament, and to be considered as sitting in respect of their dignities, which there is some reason to believe was always the case with the dignified Clergy. This idea must indeed have been most palatable to themselves, and would therefore be cherished by them, as calculated to create a more marked distinction between them and the smaller Barons, who sat only in respect of their lands.

The eldest sons of Peers, connected as they were with their fathers dignities, would of course cease to be ranked as part of the small Barons, *libere tenentes*, or freeholders; and it would be reckoned sufficient, that Parliament was attended by their fathers, who were in immediate possession of the honours, and of course would answer for them. In a small tract written by Chalmers of Ormond, who had been a Lord of Session in the time of Queen Mary, and which was published by him at Paris in the year 1579, there is a remarkable passage, in which he describes the Noblesse of Scotland, and wherein he says, ' Et combien que en parlant ou escrivant precisement de la Noblesse Escossoise, on l'entend comprendre seulement ceux dictz Ducs, Comtes, & Seigneurs, dictz *my Lords*, avec leur fils aînez, (appellé en Escossois *Masters*), excepté le fils aîné du Comte de Huntly, nommé *my Lord Gordon*, et le fils aîné du Comte d'Argil, dit *my Lord Lorne*, toutes fois, leur freres puînx, et les autres Barrons, avec tous descendus d'iceux, s'ils sont vertueux, et ayent suffisamment pour s'entretenir, sont appelez du commun peuple en Escossois *Noble Gentil-men*, en François *Nobles gentils hommes*. ' From this it would appear that in the time of this author, the eldest sons of Peers were classed with the *Noblemen*, and that the younger sons were classed with those Barons who were not Peers.

While the lesser Barons who held lands immediately of the Crown, were but few in number, and those few were possessed of considerable estates, their occasional attendance for a few days in Parliament would

not be felt as a grievous burden; but when, in progress of time, the larger estates came to be split amongst several owners, the burden became more severe. It accordingly appears to have been customary, for many of those who were bound to personal attendance, to name procurators or deputies to act for them; and this practice was, to a certain degree, checked by the statute 1425, cap. 52. which enacted, "That all Prelates, Erles, Barones, and Freeholders of the King within the realme, sen they are halden to give presence in the King's Parliament and General Council, fra thinefoorth be halden to compeir in proper persone, and not be a procuratour, but gif the procuratour alledge there and prove a lauchfull cause of their absence."

It was soon afterwards perceived, that, as there was great hardship, in compelling the attendance of the lesser Barons from every part of the kingdom, and as it was next to impossible to enforce it, so a meeting composed in that manner, would be too numerous for expediting business. An Act therefore passed in 1427, by which the small Barons and free tenants (the old *libere tenentes*) were to be relieved of the burden of attending in Parliament, on condition of their sending two or more wise men from each shire according to its size; and that all the Commissioners should have costage from those of their respective shires who owed attendance in Parliament.

It is highly probable, that in passing this act, James I. who had received his education in *England*, intended to put the Parliament of *Scotland* upon the same footing with the *English* Parliament, and to render the Commons a separate house. This, however, did not take effect, and the statute seems to have been entirely disregarded. The small Barons neglected to elect Commissioners, and were of course still bound to give personal attendance. A new Act accordingly passed, 1457, c. 75. providing, "That no Freeholder under L. 20 should be constrained to come to Parliament as for presence, except he were a Baron, or were specially called by the King's officer, or by writ." And in the reign of James IV. another Act passed, 1503, c. 78. relieving all Barons and Freeholders whose estates were within 100 merks of new extent, unless specially written for by the King; but enjoining all those of a higher extent to come to the Parliament, under the pain of the old fine.

Notwithstanding these statutes, the small Barons continued very remiss in their attendance. During the reign of James III. the number of those who went to Parliament, never but once exceeded thirty, and was often much less. In the reign of James IV. ten was the highest number; and in some of the Parliaments of that Prince, not one appeared. In the time of James V. we find six or seven, and still fewer during the reign of Mary. These it is likely attended in consequence of special writs from the Crown. See *Robertson's History*, vol. I. p. 202. *Keith's History*, p. 147.

It accordingly appears, that when the zeal with which the country was in general then actuated towards establishing a Reformation in matters of a religious concern, produced a Convention of all the different orders of the State, a doubt was entertained with regard to the lesser Barons having a right to sit in that National Assembly; and from a letter written by *Thomas Randolph* to *Sir William Cecil*, the minister

minister of Queen *Elisabeth*, upon the 10th of August 1560, it appears that they, on that occasion, presented a petition to the Lords, the tenor of which sufficiently shows their being apprehensive, that from the neglect of their predecessors, they might have lost the right they formerly had of sitting in Parliament. *Wight, Appendix, p. 421.*

In a subsequent letter, Randolph gives the following account of the success of the petition: "The matters concluded and past by common consent, on Saturday last, in such solemn sort as the first day they assembled, are these, *first*, That the Barons, according to an old act of Parliament made in the time of James I. in the year of God 1427, shall have a free voice in Parliament. This passed without contradiction."

But although a great number of lesser Barons attended this Convention, which was held without the authority of the Sovereign, they seem to have been afterwards as remiss as ever; for, from the year 1560 down to 1587, hardly any of the lesser Barons are to be found attending in Parliament. However they might be roused and excited upon particular conjunctures, yet in general, and upon ordinary occasions, the lesser Barons found themselves of too little account, to be at the expence of attending an Assembly where the whole authority and power were exclusively possessed by the great Nobles and Ecclesiastics.

In the proceedings of Parliaments in ancient times, it is in vain we are to look for either regularity or accuracy. They were assembled only occasionally, when the King found their aid and advice necessary; and although, according to strict feudal principles, the immediate vassals of the Crown were the only proper constituent members, yet this does not seem to have been either uniformly or regularly attended to in practice, and while many neglected altogether giving their attendance, so, on the other hand, the King seems to have exercised a power of calling occasionally others, whose counsel and assistance he wished, although not holding lands of the Crown.

In the rolls which still remain of the Parliaments held in the fifteenth and sixteenth centuries, frequent instances occur of persons mentioned there, who could have no right to sit in that Assembly, unless in consequence of having been specially called by the King. Thus *Crawford*, in his *Lives of the Officers of State*, in speaking of Bishop Elphinston, in the reign of James III. says, p. 48. "Upon the reputation of his parts and learning, the King called him to his Great Council the Parliament, where we frequently find him a sitting member, sure not in the character of his office, as Official of Glasgow or of Lothian, but allenarly by virtue of the King's calling him there by his Royal letter or summons: A prerogative we see the Crown reserved to itself, when King James II. thought fit, in the case of the Barons, to dispense with their attendance in Parliament. *That the Sovereign exerted this power of calling what Barons or inferior Clergymen he pleased to the Parliament, manifestly appears from our public archives throughout the whole of the reign of James III. and James IV.*; for there we find not only Bishops, Abbots, Priors, Earls, Barons, and the *Commissarii Burgorum*, as the burroughs are called, sitting and voting
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“ in Parliaments, but even gentlemen who never pretended to a Peerage; yea, and sometimes, as in the present case, the Official of Glasgow, sometimes the Dean, and the Archdeacon of that see, and such other inferior Clergymen, who cannot be imagined came there upon any consideration whatsoever, but that the King called them there as wise and learned men, whom he knew were well qualified to give him advice upon any juncture in the Grand Council of the nation.”

From finding, therefore, certain persons mentioned in the rolls of Parliament, we can by no means with any certainty conclude, that they sat there in their own right, and in virtue of their holding lands as vassals of the Crown. The Noble Complainer, notwithstanding all his researches, has hitherto failed to bring clear and positive proof, that such eldest sons did, at any period, sit in the Parliament of Scotland, in virtue of their being possessed of lands held of the Crown, and of their making part of the Freeholders or *libere tenentes*. He does not pretend to have discovered any eldest sons of Peers, (to all of whom in ancient times the appellation of *Master* was indiscriminately given, as it was likewise even to all their presumptive heirs, whether by blood or distination), in the rolls of Parliament prior to the year 1478. His Lordship has indeed found about thirty-two or thirty-three Masters in the rolls of Parliament (that are now extant) between that period and the year 1587, when the representation of the lesser Barons or Freeholders was established; but as no evidence has been produced to show, that more of these Masters than *twelve* or *thirteen* at most, were possessed of lands held by them of the Crown, so it does not appear, that they ever sat in the character of Freeholders or lesser Barons.

On the contrary, there are strong reasons to presume, that this was not the case; for, *1st*, These Masters are in no one instance described by their lands; whereas the lesser Barons are in the rolls of Parliament uniformly so described. *2^{dly}*, Some of them might have attended as proxies for their fathers. It is indeed proved by the act 1425. cap. 52, that proxies were allowed, even for Freeholders. *3^{dly}*, Their sitting in the character of lesser Barons or Freeholders is inconsistent with what passed at the famous Convention in 1560, as the doubt which then arose respecting the right of the lesser Barons to attend in Parliament, and their petition to be restored to that right, never could have existed, if those Masters who are to be found in some of the rolls only a few years before, had been understood to have sat in virtue of their lands, and in the character of lesser Barons or Freeholders. Nor is it any answer to this, that other lesser Barons are likewise to be found in the rolls of Parliament. They likewise may have attended in consequence of a special summons from the Crown, which is surely more probable, than that the whole body should know so little of their own rights, as to present a petition for the purpose of obtaining an acknowledgement of what they had always enjoyed, and of which they were actually in possession at the time.

The presumption therefore is, that all those *Masters* who appear in the rolls of Parliament, attended only as proxies, or in consequence of their being called by special writ; and this presumption is strong-

ly confirmed by the constant usage which took place from the time that the representation of counties was established in 1587, down to the period of the Union.

It has been contended, that the power of calling by special writ, reserved to the King by the acts of 1457 and 1503, was only meant to apply to those whose constant presence was thus dispensed with, and that it would have been adverse to the idea of Parliament, as well as an insult to the dignity and privileges of those who sat there, to introduce amongst them any person who was not a tenant *in capite* of the Crown.

This observation stands however unsupported by evidence of any kind. It ought to be remembered, that in those days, attendance in Parliament was considered, not as a privilege bestowed upon, but as a burden inherent in, a certain tenure. Why, therefore, presume the King restrained from requiring the assistance of any of his subjects in his Great Council, but those who were possessed of landed property held immediately of the Crown? It is more reasonable to suppose, that his prerogative intitled him to lay that burden upon any person he chose to summon; and it is at least probable, that in the exercise of this prerogative, he would call upon persons high in point of rank, or of consequence in other respects.

It is no doubt true, that those *Masters*, who, upon the authority of *Randolph's* letter to Sir *William Cecil*, (for there is no other), are said to have attended the Convention of Estates in 1560, could not have been summoned by the Crown, that Convention having assembled without the Royal authority. But laying out of the question, that one of the five *Masters*, whose names are to be found in the list (*viz.* the *Master of Lindeſay*), was not the eldest son of a Peer, it must appear sufficient to observe, that the Convention was called by those who took the lead in the conduct of affairs, in consequence of an article in the treaty of *Leith*, while the importance of the business then in agitation, would render any person of consequence welcome to a National meeting held independent of the Royal authority. It is accordingly worthy of remark, that *Randolph*, in his letter to *Cecil*, after giving a particular list of Clergy, Nobles, Peers eldest sons, Commissaries for Burghs, and lesser Barons, adds, "with many other Barons, Freeholders, landed men, but all armour."

But even supposing that the eldest sons of Peers, as well as every other person holding lands immediately of the Crown, were not only intitled, but bound to attend in Parliament; and further, supposing it true, that they did actually attend in that character down to the year 1587, when the *representation* of the lesser Barons was established; yet it is an undisputed and incontrovertible fact, that from that period down to the present day, there is not a single instance to be found, of the eldest son of a Scottish Peer representing either a Scotch County or Burgh in Parliament. It cannot be supposed that this could proceed from mere accident. Considering attendance in Parliament as a burden, it must have been natural for the freeholders to impose it upon them, as most able to bear it; and, considering it as a privilege, they would in all probability be disposed to court it. The fact

fact can therefore only be rationally accounted for, by supposing it to have been understood to be a constitutional point, that they were *ineligible*, on account of their intimate connection with a higher order in the State, and of which they seem, from the passage above referred to in the work of *Chambers of Ormond*, to have been understood to make a part.

In order to assign some reason for the total absence of the eldest sons of Peers from Parliament after the representation of the lesser Barons was established, it was said, that, to be the delegated deputies and hired messengers of such inferior persons, could but ill besit the gallant sons of proud and independent Nobles. This however is not altogether consistent with the foundation of the complainer's plea, which rests entirely upon their being bound to attend, by being lesser Barons or Freeholders; the consequence of which must have been, to put it out of their power to refuse that burden, when imposed upon them by the other freeholders. The conclusion drawn from their haughty spirit will, at the same time, appear to be better founded, when applied to a more ancient period, when all the lesser Barons, except those of the smallest estates, were upon the same footing. The eldest sons of Peers might then wish to keep themselves distinguished from an order of men, whom they considered to be greatly their inferiors. On that account they would be unwilling to appear in Parliament, unless in the character of proxies for their fathers, or when summoned by special writ; and hence it came to be understood, that although possessed of lands held immediately of the Crown, they did not belong to the order of freeholders, and therefore were not bound to come to Parliament; the more especially as, after the introduction of personal honours, their fathers were considered to hold their seats by virtue of their dignities, and not of their possessions, as in more remote ages.

That the act 1587 was understood to exclude the eldest sons of Peers from sitting in Parliament, there is also much reason to presume, from the general dissatisfaction which this statute gave to the peerage. They were sensible that it would have been inconsistent with the form into which Parliament was then moulded, for the King to continue to summon any person by special writ; and they saw that when the load was to be taken off the whole body of the Freeholders, and two only were to come from each County, and these two were to be allowed a certain sum for defraying their daily expence, the attendance of the Commons would be more regular and numerous, and of course their own parliamentary influence would be much diminished. But of this they must have had less apprehension, if it had been understood, that their eldest sons, who were to succeed them in the peerage, were capable to be chosen Commissioners from Shires.

This presumption is farther confirmed by a minute of the Parliament of *Scotland*, 18th August 1681, containing a letter from Charles II. to the Duke of *York*; in which, after stating that the county of *Kinross* had been represented in Parliament until it came almost entirely to belong to two Peers, the Earl of *Morton* and the Lord *Burleigh*, his Majesty proceeds as follows: " But that now Sir

" *William*

“ *William Bruce of Balcaiskie*, having acquired the Earl of *Morton's* interest, (which is the far greatest part of the shire), and having likewise a commission from the rest of the freeholders thereof, doth crave, that he may represent that shire in Parliament according to former custom founded upon the said act and records: And we being well satisfied with the dutiful deference shown to us by the said Sir *William* in the prosecution of that his right, it is now our will and pleasure, and we do hereby authorise and require you, to cause him to be inrolled and called in this Parliament, to the effect the said shire may enjoy its old privilege of being represented in Parliament by its Barons.”

If the eldest son of a Peer had been capable of representing the Commons in Parliament, it can scarcely be doubted, that one or both the Noble Lords who divided the shire of *Kinross* between them, would from time to time have taken care that their eldest sons should have lands of 40s. of old extent, in order to represent the county; for, though confidential conveyances were at that time unknown, a father could have been under no difficulty, in such circumstances, to divest himself of a part of his estate in favour of his eldest son and presumptive heir.

It is in vain the Complainer resorts to the different statutes relative to the election of Commissioners from shires, to shew, that under the words *Freeholders*, *Heritors*, &c. occurring in these statutes, the eldest sons of Peers who were seised in lands held in chief of the Crown, must have been included. Custom is the best interpreter of the words made use of in an act of Parliament, and under such a guide we must with certainty discover, Whether a particular expression, or term, has been adopted in the view of including all who can possibly be comprehended under it, or only in a more limited sense. Had any usage prevailed of eldest sons of Peers representing Counties in the Parliament of *Scotland* subsequent to the act 1587, it might have been more difficult to maintain that they were not included under the general terms of *Freeholders*, *Heritors*, *Liferenters*, *Wadsetters*, &c. that appear in these statutes. There is however good reason to presume that the Legislature, in passing these statutes, had no idea of including them under these general terms; and it is scarcely necessary to add, that some of these statutes are very far from being correct and accurate in the form of expression.

Even, therefore, if the present question was left to rest upon the statute-law, and upon the usage, from the year 1587 down to the period of the Union, it would be sufficiently clear. But farther, it does not rest even here; for every doubt is removed by two explicit determinations of the Parliament of *Scotland* itself, the one in the case of the eldest son of the Viscount of *Tarbat* in 1685, and the other in the case of Lord *Livingston* in 1689.

Sir *George Mackenzie* was created Viscount of *Tarbat*, by letters-patent, bearing date the 15th of April 1685. His eldest son had been returned one of the Commissioners for the County of *Ross*; but it was determined that he was now incapable of sitting, and the following resolution appears in the records. April 23. 1685. “ In respect the

“ Viscount of *Tarbat's* eldest son, elected one of the Commissioners
“ for

“ for the shire of *Ross*, by reason that his father is nobilitate, cannot
 “ now represent that shire, warrant was given to the Freeholders of
 “ that shire to meet and elect another person in his place.” Accord-
 ingly his name does not appear in the roll; and the Commissioners
 for the shire of *Ross* are Sir *George Munro* of *Culcairn*, and Sir *Donald*
Bayne of *Tulloch*.

Those who composed the Parliament of *Scotland* in 1685, must have
 been at least as well qualified to judge of a question regarding its con-
 stitution, as even the most enlightened antiquaries of the present age.
 But the resolution above inserted, with regard to the incapacity of the
 eldest son of the Viscount of *Tarbat*, shows it to have been then a
 settled point, that the eldest sons of Peers were ineligible. This reso-
 lution must also have the greater weight, when it is considered, that
 it was not formed in a controverted election, which, according to the
 practice, would have gone before a Committee appointed to try such
 cases, but was taken up by Parliament itself. And it is in vain the
 complainer attempts to derogate from the force of this precedent, ei-
 ther by abusing the Viscount of *Tarbat*, as the defender of the pro-
 ceedings that took place in the preceding Parliament, when the Duke of
York acted as Commissioner for his Royal Brother; or by conjecturing,
 that as it was not a time for urging unpopular topics, especially in the
 case of a son of an obnoxious minister, the Viscount chose rather to
 withdraw his son from Parliament, than to try the question. It is
 well known, that the Viscount of *Tarbat* stood at that time high in
 favour with King *James*; and although the arbitrary measures that
 were afterwards adopted by that Monarch, soon proved ruinous to his
 family, few Princes were more popular at the time of their succession.
 It is therefore impossible to believe that the Viscount of *Tarbat* could
 have any inducement for withdrawing his son from Parliament on
 this occasion, or that the seat of the son would have been vacated in
 this manner, if it had not been understood to be perfectly clear, that
 the ennoblement of the father did, *ipso facto*, disqualify him from
 holding it.

On occasion of the memorable Convention of Estates which con-
 vened in 1689 to settle the government of the kingdom, an attempt
 was made by Lord *Livingston*, the eldest son of a Peer, to be chosen
 as the Representative of the Burgh of *Linlithgow*. It accordingly ap-
 pears, that after *William Higgins* had been chosen and declared duly
 elected, his Lordship prevailed with the common clerk of that Burgh
 to call a new meeting for election, and to return him also; but the
 merits of the election were decided in favour of *Higgins*. And it is
 remarkable, that although he omitted to state his antagonist's disqua-
 lification, contenting himself with averring that he had a majority of
 legal votes in his favour, and that the clerk had been guilty of a gross
 irregularity, not only in admitting bad votes for the Noble Lord, but
 also in holding a *second* election, after *Higgins* had been chosen to re-
 present the Burgh; yet the Committee of controverted elections, un-
 willing to allow the ineligibility of the eldest son of a Peer to pass un-
 noticed, came to the following resolution. *March* 18. 1689. “ In the
 “ controverted elections for the Burgh of *Linlithgow* in favour of the

(M)

“ Lord

“ Lord *Livingston* and *William Higgins*, it is the opinion of the Committee, that *William Higgins's* petition should be preferred, 1st, In regard of the Lord *Livingston's* incapacity to represent a Burgh, being the eldest son of a Peer; and, 2^{dly}, In respect *William Higgins* was more legally and formally elected by the plurality of the votes of the Burgesses.” This resolution was approved of and signed the same day. “ The meeting of the Estates having heard and considered the report of the Committee, they approve of the same in both heads thereof.”

The Complainer has in vain attempted to invalidate the force of this resolution. The circumstance on which he chiefly founds, namely, that the memorial or case for Mr *Higgins*, takes not the smallest notice of the ineligibility of Lord *Livingston* as the eldest son of a Peer, serves only to show that the Committee who tried the question, were too attentive to the constitution, to allow the Noble Lord's ineligibility to pass unnoticed, even in a case where there were other good grounds for deciding in favour of the other candidate.

These two precedents are most precisely in point, and clearly shew, that by the constitution of the Scottish Parliament, the eldest son of a Peer was held ineligible for either a county or a borough. And if this be the case, there is an end of the question; it having been enacted by the Act 1707, cap. 8. which was declared to be as valid as if it were a part of, and engrossed in the treaty of Union, “ That none shall be capable to elect or to be elected to represent a Shire or Burgh in the Parliament of *Great Britain* for this part of the united kingdom, except such as are now capable, by the laws of this kingdom, to elect or to be elected Commissioners for Shires or Burghs to the parliament of *Scotland*.”

The Noble Complainer has endeavoured to derive some aid from the minutes of the Parliament of Scotland upon that occasion. From these it appears, that, 24th January 1707, it was proposed that, “ Thirty shall be the number of the Barons, and fifteen the number of the Burghs, to represent this part of the united kingdom in the House of Commons in *Great Britain*; and that no Peer, nor the eldest son of any Peer, can be chosen to represent either Shire or Burgh in this part of the united kingdom, in the said House of Commons.” The question was accordingly put, “ If the number shall be thirty for the Barons, and fifteen for the Burghs?” which was carried.

The House then adjourned till the 27th of the month; and the second part of the clause relative to Peers and their eldest sons, being again read, it appears from the minutes, that, after a debate thereon, another clause was offered in these terms: “ Declaring always, “ That none shall elect nor be elected to represent a Shire or Burgh in the Parliament of *Great Britain*, from this part of the united kingdom, except such as are capable, by the laws of this kingdom, to elect or to be elected as Commissioners for Shire or Burgh to the said Parliament.” And after further reasoning thereon, the vote was stated, “ Approve of the first clause, or of the second.” Before voting, however, it was agreed that the votes should be marked, and that a list of the Members names, as they voted, be printed, and recorded;

corded; and the Lord Chancellor was allowed to have his name printed and recorded amongst those who voted for the second clause. Then the vote was put, "Approve of the *first* clause, or *second*;" and it was carried, "*Second*."

From all this, the complainer is pleased to suppose, that the question with regard to the eligibility of the eldest sons of Peers was held to be at least doubtful; but the smallest attention to what generally passes in popular assemblies, will show that there is nothing solid in the observation. The first motion, That Peers and their eldest sons were incapable to elect or be elected, would no doubt have been more satisfactory than the second, which, without any express determination, left matters as they stood: But it does not follow, that they were then deemed capable of electing, or being elected; on the contrary, the proposers of the first motion must have expected to carry it. Indeed, it was only lost by a majority of *eighty-six* to *seventy-two*, while the Peers did not venture to put the direct question, That they themselves, or their eldest sons, were eligible. Each party, as is uniformly the case in such assemblies, wished to carry the motion most decisively in their own favour: and there is a palpable defect in the inferences drawn by the Complainer; for if they prove any thing at all, they prove too much.

Every argument, which, from the double state of the question, has been drawn in favour of the eldest sons of Peers, is equally applicable to their fathers; and yet it will not be said, that at that time of day there was any idea, that, in the Parliament of Scotland, Peers were intitled to sit as the Representatives of the Commons. Besides, the *first* motion was only directed to a particular object, and must have been followed up by other resolutions, in order to settle who were qualified to elect or be elected. It was therefore more proper to form one general resolution, which in a few words would settle the whole at once; and it was so framed as to leave no doubt. Peers might likewise be averse to declare their eldest sons expressly excluded, lest it might prove an example for excluding them from seats in *England*.

But farther, could there have remained any doubt as to the ineligibility of the eldest sons of Peers to represent a *Scotch* County or Burgh, it is removed by the resolutions of the House of Commons, in the cases of Lord *Haddo* and other persons in the same situation, in the year 1708. It is a mistake to suppose that these resolutions were carried in any hasty or precipitant manner. In a book printed in the year 1709, and intitled, *The History of the Reign of Queen Anne, digested into Annals*, it is mentioned, that Mr Serjeant Pratt, Mr Phipps, Mr Raymond, and Mr Lutwich, were heard as Counsel; and it gives an abstract of the arguments which were urged. In particular, the resolutions of the Parliament of Scotland respecting the Master of Tarbat in 1685, and the Lord Livingston in 1689, were much relied on; so that there can be no pretence for saying that the House of Commons proceeded without the fullest information, and the most attentive consideration of the case.

In that *Collection*, which goes under the name of *Lord Somers Tracts*, vol. 15. x. 5. p. 76. there is a paper intitled, *The Case of the Commons of that*

that part of Great Britain formerly called Scotland, with respect to the Election of their Representatives and Members to Parliament. It would seem to have been a paper distributed at the time of the question before the House of Commons in 1708. It states, *verbatim*, another paper then distributed, in support of the right of the eldest sons of Peers, and then gives answers to every thing that had been there urged.

In the paper for the eldest sons of Peers, much weight had been laid upon the vote of the Parliament of Scotland in 1707, which has been above mentioned; and in answer to this, it is amongst other things said: "But, in the next place, it is to be remembered, that in the Parliament of Scotland held in the year 1690, *though the Peers did press very earnestly to have it declared, that the eldest sons might be capable to elect and be elected at that time*, when there was an additional representation granted to several Shires in Scotland, *they could not prevail*; on the contrary, the Act passed without any such declaration." The truth of this important fact indeed, rests entirely upon the authority of the paper referred to; but the assertion, unless true, could scarcely have been hazarded in the year 1708, when the transactions of so recent a period as the year 1690, must have been fresh in remembrance.

In short, as the resolutions of the House of Commons in 1708 went the length of declaring, that the eldest sons of Peers of *Scotland* were incapable, by the laws of *Scotland* at the time of the Union, to *elect*, or be *elected*, as Commissioners for Shires or Burghs to the Parliament of Scotland, and therefore, by the Treaty of the Union, were incapable to elect or be elected to represent any Shire or Burgh in Scotland, to sit in the House of Commons of *Great Britain*, it is humbly conceived, that, independent of every other consideration, these resolutions must afford an effectual bar to the Complainer's claim to be admitted to the roll of Freeholders of any County in *Scotland*; more especially, as, by the act of 2d George III. cap. 24. it is expressly enacted, "That such votes shall be deemed to be legal, which have been so declared by the last determination in the House of Commons; which last determination, concerning any county, city, burgh, cinqueport, or place, shall be final to all intents and purposes whatsoever, any usage to the contrary notwithstanding."

The matter has accordingly ever since been understood to be completely settled; and it is so stated by every author who has since written upon this branch of the law of Scotland; by *Forbes*, p. 21; by *Spottiswoode*, p. 49, and 59; by *Lord Bankton*, b. 4. tit. 1. § 41; and by *Mr Wight*, p. 269. No attempt has been made since the year 1708, by the eldest son of any Peer of *Scotland*, to represent in Parliament the Commons of that part of the united kingdom; and in every instance that has occurred of a Representative, either of a County or of a district of Burghs in *Scotland*, becoming the eldest son of a *Scottish* Peer, his seat has been understood to be vacated, and a writ has issued for the election of a new member of the House of Commons in his place. The attempt, therefore, on the part of the Complainer, to revive a claim in behalf of himself and others of his

his order, to a right which they confessedly have not enjoyed for upwards of two centuries, and which it is not proved they ever enjoyed, will meet with no countenance, especially when in direct opposition to repeated resolutions of the whole body of the *Scottish* Parliament, and of the *British* House of Commons.

The interlocutor of the Court, 25th January 1792, was in these words :

“ The Lords having resumed the consideration of the petition and
“ complaint of the Right Honourable Basil William Douglas, com-
“ monly called Lord Daer ; and having advised the same, with
“ the answers thereto by the Honourable Keith Stewart, and o-
“ thers, Freeholders of the county of Wigton, replies for the Com-
“ plainers, duplies for the Respondents, and writings produced ; and
“ having heard parties procurators upon the whole ; they sustain the
“ objection to the Complainers claim to be inrolled : Find the Free-
“ holders of the county of Wigton did right in refusing to inrol him ;
“ and therefore dismiss the complaint, assoilzie the Respondent, and
“ decern : Find the Complainer liable to the Respondents in the statu-
“ tory penalty of L. 30 Sterling, and decern against him therefor :
“ Find him also liable in full costs of suit, and appoint an account
“ thereof to be given in to Court.”

This judgement was affirmed by the House of Lords, 26th March 1793.

For Lord Daer, *Dean of Faculty, Solicitor-General, Cullen, Morthland, et Cha. Hope.*

For the Freeholders, *Wight, Geo. Fergusson, Montgomery, et Busby Maitland.* Clerk, *Hume.*

E R R A T A.

- p. 45. l. 18. from the bottom, for *later* read *latent*.
 p. 109. l. 10. for *Alexander Jardine* read *William Jardine*.
 p. 178. l. 8. from the bottom, for *the L. 62* read *the balance due to him*.
 p. 205. l. 6. from the top, after *proceedings*, add *in an action of multiple-poinning*.
 p. 239. l. 28. for § 67 read § 56.
 p. 279. l. 16. for *pursuer* read *defender*.
 p. 299. l. 14. for § 5. read § 6. and 7.
 p. 337. l. 6. from the bottom, after *circumstances* a full point.
 p. 357. l. 1. and 2. the words *23d December 1738, Macleslie*, should follow the word *penalties*.
 p. 367. l. 12. from bottom, delete *under the title of Bereans*.
 p. 379. l. 9. from the bottom, for *by the lex domicilii* read *from*.
 p. 380. l. 18. from the bottom, delete comma after the words *that is*.
 p. 383. l. 3. delete *and*.
 p. 384. l. 3. delete *and that*.
 p. 440. l. 11. from bottom, (title), for *and appointed*, read *the declaration being appointed*.
 p. 449. l. 15. for *latter* read *later*.

Note. As to the opinion of the Court, in the case of *Sword contra Blair*, (p. 280.) there is authority for now stating, that what chiefly weighed with the majority of their Lordships, was not the circumstance there mentioned, but the general understanding and practice of merchants, regarding stipulations of interest in bills, *e. g.* bankers notes and East-India bills; which indicated, that such of the later decisions as had set aside bills bearing a clause of interest, were erroneous, and ought not to be followed as precedents.

In the INDEX.

APPROBATE AND REPROBATE. One cannot be required, on this principle, to do an illegal act, or what would expose him to a forfeiture of a valuable estate. *Viscount of Arbutnott against his Children and their Tutor ad litem*, July 4. 1794.

BANKRUPT. Article 3. Instead of "hurtful to creditors" read "hurtful to the creditors."

CAUTIONER. Article 4. For the decision of this case in the House of Lords, see *Abstract of Appeal Cases*.

PROCESS. Article 3. delete *But*. And article 4. read thus: "But even in a process in an inferior court, and where the defender was not personally cited, a decree in absence, if not challenged by the defender himself when he had a proper opportunity, held *pro re judicata*, although the regulations in 1672 and 1693 do not apply," &c.



A B S T R A C T

OF THE

JUDGEMENTS of the HOUSE OF LORDS,

IN THE

CASES contained in this VOLUME.

N^o I.

March 11. 1793.

JOHN HAY BALFOUR, and others,

AGAINST

Miss HENRIETTA SCOTT.

“ *ORDERED* and *adjudged*, That the original appeal be dismissed, *i. e.* at the suit of Hay Balfour and others, and that the interlocutor complained of by the cross-appeal for Henrietta Scott be reversed; and it is declared, that the said Henrietta Scott is intitled to claim her distributive share in the whole personal estate of her uncle David Scott, to which he succeeded as heir by the law of England, where he had his domicil at the time of his death.”

N^o XXV.

April 15. 1790.

ELISABETH and MARGARET BRUCE,

AGAINST

JAMES BRUCE of Kinnaird.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors complained of affirmed.”

a

N^o XXXII.

(2) A P P E N D I X.

N° XXXII.

February 7. 1793.

ARCHIBALD DUFF and JAMES HENDERSON,

A G A I N S T

JANET HENDERSON.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed, with L. 200 costs.”

N° XXXIV.

April 7. 1789.

WALTER SCOTT,

A G A I N S T

The CREDITORS of SETON of Touch.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N° XXXVIII.

May 25. 1789.

FRANCES HAY,

A G A I N S T

ROBERT HAY.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N° XL.

June 15. 1789.

JOHN WOOD and COMPANY,

A G A I N S T

ARCHIBALD HAMILTON.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N° XLVIII.

N^o XLVIII.

ALLAN, STEUART, and COMPANY,

A G A I N S T

CREDITORS of JAMES STEIN.

The point determined in this case was brought under appeal in the following one.

December 23. 1790.

HENRY JAFFRAY, and others,

A G A I N S T

ALLAN, STEUART, and COMPANY.

“ *ORDERED*, That the interlocutors of the 11th December 1788, the 4th March 1789, and 5th March 1789, complained of in the original appeal, be reversed, without prejudice to the respondents in the said appeal producing evidence to shew, that they were intitled to stop and retain the grain consigned by them to James Stein the bankrupt: *Ordered*, That the cause be remitted back to the Court of Session, to take such evidence, and hear the parties: *Ordered*, That the interlocutor of 5th March 1789, complained of by the cross-appeal, be affirmed.”

N^o LXVII.

April 9. 1790.

Sir WILLIAM FORBES, Baronet, of Craigievar, and others,

A G A I N S T

Sir JOHN MACPHERSON, Baronet.

“ *ORDERED*, That the interlocutors complained of be reversed; and it is farther *ordered*, That the respondent do confess or deny the averments in the appellants pleadings.”

N^o LXXXV.

(4)

A P P E N D I X.

N^o LXXXV.

May 7. 1792.

REBECCA HOG,

AGAINST

THOMAS HOG.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of be affirmed.”

N^o LXXXVII.

June 15. 1792.

JAMES OGILVIE,

AGAINST

THOMAS WINGATE.

“ *ORDERED*, That the interlocutors complained of, so far as they
“ declared generally, That the landlord’s hypothec over the crop
“ and stocking cannot be defeated by the prerogative process of the
“ Crown, in virtue of the statute 33d Henry VIII, as extended to
“ Scotland by the articles of Union, and the act of Parliament 6th of
“ Queen Anne, be reversed. But in respect that the King’s title
“ does not sufficiently appear in the process, it is farther *ordered*, That
“ the cause be remitted to the Court of Session, to inquire more par-
“ ticularly into the process, and conduct thereof, in virtue whereof
“ the effects in question are supposed to have been subjected to the
“ King’s title.”

N^o LXXXVIII.

February 25. 1791.

NEWNHAM, EVERETT, and COMPANY,

AGAINST

DAVID STEUART.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N^o LXXXIX.

N^o LXXXIX.

February 23. 1791.

HELEN SCOTT,

AGAINST

JERDON CAVERHILL.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N^o XCIX.

April 8. 1791.

JAMES WATSON, and THOMAS MOLLISON,

AGAINST

PATRICK LAING.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N^o CI.

May 11. 1791.

Sir JOHN HENDERSON, Baronet,

AGAINST

ROBERT BRUCE-HENDERSON.

“ *ORDERED*, That the appeal be dismissed, and the interlocutor
“ complained of affirmed.”

N^o CXVII.

April 6. 1791.

JAMES BAILLIE,

AGAINST

ELISABETH CHALMERS, *alias* SCOTT.

“ *ORDERED*, That the part of the interlocutor complained of be
“ reversed, in so far as it finds generally, That James Baillie is per-
“ sonally liable to Mrs Elisabeth Chalmers for L. 688 of expences of
“ process and extract, which Helen Douglas was decerned to pay:
“ But it is *declared*, That the said James Baillie is responsible for the
“ conduct of the cause, in so far as the same is malicious, vexatious,
“ and
b

(6)

A P P E N D I X.

“ and calumnious : *And it is ordered*, That the cause be remitted back
“ to the Court of Session, to inquire how much of the said sum of
“ L. 688 of expences of process and extract has been occasioned by
“ the conduct of the defender in the said cause.”

N^o CXXXVI.

April 15. 1791.

The MAGISTRATES of ANNAN,

A G A I N S T

Mrs MARY SHORTREID.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N^o CXL.

April 13. 1791.

THOMAS LIVINGSTONE,

A G A I N S T

The EARL of BREADALBANE.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

N^o CXLVII.

April 20. 1791.

JOHN LAIRD,

A G A I N S T

ARCHIBALD and JOHN ROBERTSONS.

“ *ORDERED*, That the interlocutors complained of be reversed,
“ and the cause remitted back to the Court of Session, to pass the bill
“ of suspension.”

N^o CLIV.

March 28. 1792.

WILLIAM SIMPSON,

A G A I N S T

The Honourable ANNE KER, and others.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ therein complained of be affirmed.”

N^o CLV.

N^o CLV.

March 5. 1792.

Colonel ROBERT PRINGLE,

A G A I N S T

The FREEHOLDERS of SELKIRKSHIRE.

“ *ORDERED* and *adjudged*, that the appeal be dismissed, and the interlocutors complained of affirmed.”

Nota. The judgement of the Court of Session in this case, being contrary to that afterwards pronounced 31st May-1791, Alexander Milne *contra* the Freeholders of Aberdeenshire, it has been thought proper to notice it. The judgement of the Court in the case of Milne was afterwards appealed from, and reversed in the House of Lords; so that the question, as to trying the objection of nominality after the four kalendar months, may be considered as at rest.

N^o CLIX.

March 5. 1791.

PETER SPIERS,

A G A I N S T

Sir ALEXANDER CAMPBELL, Baronet.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors complained of affirmed.”

N^o CLXXXII.

1793.

ARCHIBALD MILNE,

A G A I N S T

The FREEHOLDERS of ABERDEENSHIRE.

“ *ORDERED*, That the interlocutors complained of be reversed.”

N^o CCVI.

June 11. 1794.

CREDITORS of Sir ROBERT MAXWELL,

A G A I N S T

TRUSTEES of PATRICK HERON.

“ *ORDERED* and *adjudged*, That the interlocutor of 8th February 1792, complained of, be, and the same is hereby affirmed; with
“ the

(8)

A P P E N D I X.

“ the following variations, *viz.* after the word (for) insert (half),
“ and after (the) leave out (whole), and after (cargo) leave out to
“ the end of the said interlocutor, and insert (each of them having
“ been indebted, as principal, for a moiety thereof, and as security
“ for the other moiety): *And* it is farther *ordered* and *adjudged*, That
“ the interlocutor of 23d February 1792, also complained of in said
“ appeal, in so far as repugnant to said interlocutor, varied as afore-
“ said, be, and the same is hereby reversed.”

N^o CCXIX.

June 11. 1794.

The TRUSTEES of GEORGE ROSS,

A G A I N S T

SARAH AGLIANBY.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of affirmed.”

App. N^o I.

March 25. 1790.

The MAGISTRATES of EDINBURGH,

A G A I N S T

The MEMBERS of the COLLEGE of JUSTICE.

“ *ORDERED*, That the appeal be dismissed, and the interlocutors
“ complained of be affirmed.”

App. N^o III.

March 26. 1793.

L O R D D A E R,

A G A I N S T

KEITH STEWART.

“ *ORDERED* and *adjudged*, That the appeal be dismissed, and the
“ interlocutors complained of be affirmed.”



I N D E X.

I N D E X

OF THE

PURSUERS and DEFENDERS Names in the foregoing Decisions.

PURSUERS.	DEFENDERS.	Page Num.	PURSUERS.	DEFENDERS.	Page Num.
A.					
Aitkin	Gray	263 134	Dennistoun	Harkness	323 161
Allan	Macrae	367 181	Donaldson	Kinghorn (mag. of)	148 82
Allan, Steuart, & Co.	Stein's creditors	84 48	Dougall's trustees	Dougall	150 83
Allardes	Morison and Murison	39 23	Douglas and Husband	Douglas Sir C's trust.	118 65
Alison	Proudfoot and Lister	29 17	Douglas, Heron, & Co.	Clerk	431 205
Annand	Ross	242 125	Dun	Colhoun	11 6
Arbuthnot	Cockburne	169 93	Dunbar (Sir J. cred. of)	Abercromby (Sir G.)	215 114
Arbuthnot (Lord)	His children	462 220	Dunbar (Sir William)	Davidson	155 86
Archibalds	Marshall	8 4	Dunbar (Sir William)	Sinclair (Sir James)	190 102
Argyle (D. of)	Sheardale (feuers of)	80 46	Dunbar (Sir William)	Sutherland	199 107
Armour	Campbell	417 198	Dunkeld Little (min. of)	Heritors of	244 126
Auchindachy's creditors	Grant	423 201	Dunlop and others	Muir and others	362 179
			Durie	Coutts	404 194
					397 192
B.					
Baird	Aitken	33 19	E.		
Baillie	Doig	238 123	Edinburgh (city of)	College of Justice App. r	1
Balfour	Moncrieff	23 13	Edinburgh county (pr. fiscal of)	Dott and Paterfon	134 74
Ballenden	Argyle (D. of)	465 221	Edinburgh Glasfhouse company	Shaw	183 100
Banks and others	Jaffray and others	451 215	Elliot (Thomas)	Elliot (John)	178 98
Birtwhistle	Daer (Lord)	335 165	Elphinstone (Lord)	Keiths	246 127
Black	Black	22 12	Erkine (Hon. Henry)	Hope (Hon. John)	236 122
Blair	Kinloch (ag. in sale of)	142 79	Erkine (Hon. James)	Graham	312 156
Blairs creditors	Blair	361 177	F.		
Breadalbane (E. of)	Livingston	276 140	Falconer	Hay	151 84
Brough's creditors	Selby's heirs	351 171	Fall (creditors of)	Sir W. Forbes & Co.	265 135
Brown	Storie	272 137	Fairservice	Whyte	125 69
Brown & Co.	Wilson	282 142	Fairservice	Whyte	127 70
Brown	Coventry	447 213	Farquhar-Gordon and Curators	Gordon's trustees	314 157
Bruces	Bruce	41 25	Finlay	Bertram, Gardner, & Co.	27 15
Bruce-Henderfon	Henderfon (Sir J.)	185 101	Ferrier	Morehead	321 160
Brunidone	Wallace (Sir Tho.)	105 59	Forbes (Sir W.) & others	Blair	119 65
C.			Forbes (Sir W.) & others	Macpherson (Sir J.)	121 67
Caitcheon	Ramfay	325 162	Forbes (Sir W.) & others	Tait and others	275 139
Campbell (Sir Alex.)	Spiers	318 159	Forrest	Funstone	112 62
Campbell (Sir Alex.)	Ballingall	353 172	Forfyth	Simpson	334 164
Cantley's attorney	Robertson	210 112	Fowler	Gillepie	114 63
Carmichael and others	Colquhoun	10 5	Frazer's trustees	Chisholm	207 111
Carrick	Harper	259 132	G.		
Chalmers	Douglas and Husband	223 117	Gardner	Hall	240 124
Charles	Skirving	44 27	Glasgow Univerfity	Selkirk (E. of) and others	299 150
Churnside	Currie	141 78	Glasgow Univerfity	Miller (Sir William)	302 151
Clark	Johnstone and P. F. of Mid Lothian	18 10	Glen	Macalpine's credit.	284 143
Cowan and father, petitioners		28 16	Gordon	Clerk	98 56
Coming	York-build. Co.	316 158	Gordon (D. of)	Macculloch	341 168
Currie's creditors	Hannay	405 195	Gordon (D. of)	Leslie, &c.	359 176
D.			Gordon Falconer	Thomson	437 208
Daer (Lord)	Stewart	App. No. 3	Grant	Gordon (D. of)	32 18
Dalhousie (E. of)	Gilmour	131 73	Grant	Richardson's repres.	53 33
Daley (kirk session of)	Newal	396 190	Grant	Hill	439 209
Dalziel	Dalziel	89 50	Gray	Seton	116 64
Dalziel	Richmond	288 145	Gray's creditors	Grant	170 94
Dalziel	Richmond	429 204	Gray	Ferguson	424 202
De la Motte	Jardine	109 60	Gray	Hope	229 119
Dempster	Lyle	354 173		Gregory	

I N D E X.

PURSUERS.		DEFENDERS.		Page Num.	PURSUERS.		DEFENDERS.		Page Num.
Gregory	Burts	61	37		Playfair and others	Walker and others	92	52	
Greig's trustees	Davidson	94	53		Pringle	Neilson	70	42	
					Pringle	Roxburgh freeholders	311	155	
					Puncheon	Haig's creditors	297	148	
H.					R.				
Haddington Magistrates	Bakers of	40	24		Ralfson	Lamont	443	211	
Haldane and others	Palmer	394	189		Reid	Woods	76	45	
Hamilton	Wood and others	65	40		Reid and others	Mary's Chapel	261	133	
Hannay	Strother	58	35		Richmond and others	Dalrymple's trustees	95	54	
Harkies	Welsh and Cuning	167	92		Ridley	Haig's creditors	101	57	
Harper's creditors	Faulds	328	163		Rigg	Paterfon and Bell	74	44	
Hay Balfour and others	Scott	1	1		Robertson	Roseberry (E. of)	64	36	
Hay	Sinclair & Co.	45	28		Robertson	Sheddan	274	138	
Hay (Robert)	Hay (Frances)	62	38		Robertsons	Laird	295	147	
Henderfon	Duff and Henderfon	52	32		Rose	Frafer	192	103	
High	Main	157	87		Rose	Frafer	194	104	
Hog	Hog	376	185		Rose's trustees	Aglianby	459	219	
Hog	Hog	381	186		Rothsay (town of)	Macniel	164	90	
Hog	Hog	407	196		Ruffell and others	Frafer	36	21	
Hutchison	Gibson's creditors	401	193		Ruffell, Rose, &c.	Rose's creditors	421	200	
					Ruffell	Fairie	444	212	
I.					S.				
Inglis	Dempster	43	26		Scotland (Bank of)	Telfer's creditors	217	115	
Jankoufka	Anderson, &c.	397	191		Scott	Leflie	14	8	
K.					Scott	Jerdons	161	89	
Ker's trustees	Mainfneil's creditors	153	85		Scott	Veitch and others	206	110	
King's printer	Bell & Bradfute	256	131		Seton's creditors	Scott	55	34	
Kinneil	Menzies	298	149		Sharp	Burt	68	41	
Kirkkliston (heritors of)	Gibson Wright	90	51		Shoolbred	O'borne	128	71	
L.					Shortreid	Annan (magistrates of)	269	136	
Laing	Watson and Mollison	179	99		Sinclair	Sinclair	175	97	
Lamb	High	146	81		Smith	Wilson, &c.	455	217	
Lamont	Lamonts creditors	172	95		Smyth	Young's trustees	123	68	
Lindfay	Drydale	34	20		Spalding	Spalding	457	218	
Lothian and others	Sutherland (trustees of)	205	109		State (officers of)	Christie	59	36	
Lothian (Mar. trust.)	Simpson	307	154		Stein (creditors of)	Newnham, Everett, & Co.	159	88	
Lovat's trustees	Chisholm	207	111		Stein's creditors	Sandeman and Graham (affinees of)	291	146	
M.					Stein's creditors	Sir W. Forbes, J. Hunter, & Co.	343	169	
Macalpine & Co.'s crs.	Parfons & Govett	419	199		Stewart (Charles)	Hoome	139	77	
M'Caw	M'Caws	12	7		Stewart	Hoome	440	210	
Macculloch	Maitland	50	31		Sutherland's trustees	Lockhart and others	205	109	
Macdonald	Kinloch (ag. in sale of)	203	108		Swinton's trustee	Forbes (Sir W.) & Co.	220	116	
Macdowall	Macdowall	165	91		Sword	Blair	280	141	
Macdowall	Molier	356	174		Syme	Douglas, Heron, & Co.	96	55	
Macfarlane	Grieve	252	130		T.				
Mackellar's creditors	Macnath	345	170		Tailzeour	Tailzeour	19	11	
Mackenzie	Morison	365	180		Thomson	Edinburgh tolbooth (keeper of)	130	72	
Mackenzie	Rose and Ogilvie	371	183		V.				
Mackenzie's creditors	His children	427	203		Vere	Hyndford (Earl of)	374	184	
Macleod (Lord)	Rose and Monro	37	22		W.				



I N D E X

I N D E X

OF THE

DEFENDERS and PURSUERS Names in the foregoing Decisions.

DEFENDERS.	PURSUERS.	Page Num.	DEFENDERS.	PURSUERS.	Page Num.
A.			Douglas, Heron, & Co. Syme		
Abercromby (Sir Geo.)	Dunbar (Sir Ja. crs of)	155 86	Douglas and Husband	Chalmers	223 117
Aberdeenshire Frechold.	Milne	368 182	Douglas Sir C's trustees	Douglas & Husband	431 205
Adam	Paisley Magistrates	303 152	Drydale	Lindsay	34 20
Aglianby	Rofs's trustees	459 219	Duff & Henderson	Henderson	52 32
Aitchison	Wood	136 75	Dunkeld Little, (he- ritors of)	Minister of	362 179
Aitken	Baird	33 19	E.		
Allen	Miller	455 216	Edinburgh Magist.	Wilson	47 29
Anderfon	Jankoufka	397 191	Edinburgh tolbooth (keeper of)	Thomson	130 72
Annan (magist. of)	Shortreid	269 136	Elliot (John)	Elliot (Thomas)	178 98
Arbuthnot's (L's child.)	Arbuthnot (Lord)	462 220	F.		
Argyle (D. of)	Ballenden	465 221	Fairie	Ruffel	444 212
B.			Faulds	Harper's creditors	328 163
Ballingall	Campbell (Sir Alex.)	353 172	Ferguson	Gray	424 202
Bell & Bradfute	King's printer	256 131	Sir W. Forbes, & Co.	Swinton's trustee	220 116
Bertram, Gardner, & Co.	Finlay	27 15	Sir W. Forbes, & Co.	Fall's creditors	265 135
Black	Black	22 12	Sir W. Forbes, J. Hun- ter, & Co.	Stein's creditors	343 169
Blair	Forbes (Sir W.) & others	119 66	Frazer	Ruffel and others	36 21
Blair	Sword	280 141	Frazer	Rofe	192 103
Blair	Blairs creditors	361 177	Frazer	Rofe	194 104
Bruce	Bruces	41 25	Funstone	Forrest	112 62
Burt	Sharp	68 41	G.		
Burts	Gregory	61 37	Gibson Wright	Kirkliston, heritors of	90 51
C.			Gibson's creditors	Hutchison	401 193
Campbell	M'Master, Inglis, & Co.	49 30	Gillespie	Fowler	114 63
Campbell	Young	{ 196 105 198 106	Gilmour	Dalhousie (Earl of)	131 73
Campbell	Armour	417 198	Gordon (D. of)	Grant	32 18
Canongate (magist. of)	Wemy's (E. of)	103 58	Gordon's trustees	Farquhar-Gordon and curators	314 157
Chefwell, &c.	York-build. Co.	436 207	Graham	Wightman	16 9
Chisholm	Frazer's trustees	207 111	Graham	Erskine (Hon. James)	312 156
Christie	State (officers of)	59 36	Grant	Gray's creditors	170 94
Clerk	Douglas, Heron, & Co.	11 6	Grant	Auchindachy's crs.	423 201
Clerk	Gordon	98 56	Gray	Aitkin	263 134
Cockburne	Arbuthnot	169 93	Grieve	Macfarlane	252 130
Colhoun	Dun	215 114	H.		
College of Justice	Edinburgh (city of) App. No. 1.		Haddington (Bakers of)	Magistrates of	40 24
Colquhoun	Carmichael and others	10 5	Haig's creditors	Ridley	101 57
Colt	Waddell	111 61	Haig's creditors	Puncheon	297 148
Colville	Wedderburn's trustees	100 57	Hall	Gardner	240 124
Crosse	Monteath	87 49	Hannay	Currie's creditors	405 195
Coutts	Durie	397 192	Harkness	Dennistoun	323 161
Coventry	Brown	447 213	Harper	Carrick	259 132
Currie	Churnside	141 78	Hay (Frances)	Hay (Robert)	62 38
D.			Hay	Falconer	151 84
Daer (Lord)	Birtwhistle	335 165	Henderson (Sir John)	Bruce-Henderson	185 101
Dalrymple's trustees	Richmond and others	95 54	Heron's trustees	Maxwell's creditors	433 206
Dalziel	Dalziel	89 50	High	Lamb	146 81
Davidson	Greig's trustees	94 53	Hill	Grant	439 209
Davidson	Dunbar (Sir William)	190 102	Hog	Hog	376 185
Dempster	Inglis	43 26			
Doig	Baillie	238 123			
Dott & Paterfon	Edinburgh county (pr. fiscal of)	134 74			
Dougall	Dougall's trustees	118 65			

I N D E X.

I N D E X

OF THE

PRINCIPAL MATTERS contained in the foregoing DECISIONS.

ADJUDICATION. It is not an objection to an adjudication, that the previous decree of constitution was founded on an unstamped writing. No. 96. *Mrs Amelia Lamont against the Creditors of Lauchlan and Archibald Lamont.* Dec. 4. 1789.

Lands being disposed *a me*, or *de me*, and a base infestment taken; a creditor of the disponent, in order to render his adjudication the first effectual one, may throw into his signature of adjudication a clause of confirmation; and this although the right of superiority has been before effectually adjudged by a creditor of the disponent. No. 183. *Catharine Mackenzie and others against Ross and Ogilvie, and others,* June 1. 1791.

Where the debtor's right is personal, being a conveyance of lands, with a procuratory of resignation and precept of seisin, a creditor, in order to make his adjudication the first effectual one, cannot charge the superior of the adjudged lands to enter him as vassal, but he ought to recover the conveyance, and thereupon proceed to execute the procuratory of resignation, or to take infestment on the precept of seisin. Appendix. *Henry Pearce against David Limond,* June 21. 1791.

ALIMENT. The aliment to the daughter of a respectable and ancient family due during her life, or till her marriage. No. 50. *Dalziel against Dalziel,* Dec. 14. 1788.

Aliment found due to a widow by the representative of her husband, her legal provisions being insufficient. No. 106. *Primrose Young against Charles Campbell,* Jan. 27. 1790.

A claim for bygone aliment of a bastard child, made by the mother against the father, falls under the triennial prescription. No. 164. *Agnes Forsyth against George Simpson,* Feb. 15. 1791.

See **HUSBAND AND WIFE.**

See **PERSONAL AND TRANSMISSIBLE.**

See **PRISONER.**

ANNUALRENT. A factor found liable for interest on the money in his custody. No. 127. *Lord Elphinstone against Alexander Keith,* May 15. 1790.

APPRENTICE. The indenture of an appren-

tice to one trading company not assignable to another, though carrying on the same trade; and though by the articles of partnership a continual and indiscriminate change of individual members be admitted. No. 100. *Edinburgh Glasshouse Company against Shaw,* Dec. 22. 1789.

ARBITRATION—Ultra vires compromissi. An arbiter in a settlement of accounts having involved with the subject of the submission a similar settlement between himself and the parties submitters, the decree, though from thence the transaction did not appear, was found null. No. 98. *Thomas Elliot against John Elliot,* Dec. 15. 1789.

ARRESTMENT. Act 1581. c. 18. No action on this statute for breach of arrestment *ultra valorem.* No. 209. *Alexander Grant against John Hill,* Feb. 27. 1792.

B.

BANKRUPT. Act 1783. The production of an interest in the action against a poinder, equivalent to "summoning," by the party producing. No. 15. *Finlay against Bertram, Gardner, and Company,* Jan. 16. 1788.

BANKRUPT. The effect of an assignment of personal rights, in a question with creditors in general, regulated by its date, and not by that of its intimation. No. 28. *Hay against Sinclair and Company,* July 8. 1788.

A sale of lands having been set aside as hurtful to creditors of a bankrupt, the right of the purchaser was found to be still effectual in every other respect. No. 30. *Macmaster and Company against Campbell,* July 10. 1788.

Act of federunt 1685. Act 1696. Debts affecting a bankrupt estate, conveyed to the purchaser at a judicial sale upon payment, found to be extinguished to every other effect, except that of securing the purchaser. No. 34. *Creditors of Hugh Seton against Walter Scott.* Affirmed on appeal.

The monies recovered by the factor on a sequestrated estate may not, even with the approbation of a great majority of the creditors, be placed in the hands of a merchant,

a

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I N D E X.

or company of merchants, though taking up money on promissory-notes as bankers do. No. 52. *Playfair and others* against Walker and others, Dec. 24. 1788.

Act 1783. A person carrying on the trade of building houses, though a writer by profession, intitled to the benefit of that statute. No. 110. *Andrew Scott* against John Veitch and others, Feb. 9. 1790.

Act 1696. Securities for prior debts not liable to challenge, when not immediately injurious to the creditors at large. No. 116. *The Trustee on Andrew Swinton's sequestrated estate* against Sir William Forbes, James Hunter, and Company, Feb. 19. 1790.

Act 1696. c. 5. Indorsements of bills of exchange by a merchant, to his banker, in the ordinary course of trade, not affected by the statute. In this case, the advances by the banker during the 60 days exceeded the value of the bills indorsed. No. 169. *Trustee for James Stein's Creditors* against Sir William Forbes, James Hunter, and Company, March 1. 1791.

After a legal bankruptcy, incapacity continues till solvency proved. No. 170. *The Creditors of Mackellar* against Macmath. March 1. 1791.—It is not necessary for constituting a legal bankruptcy, that the debtor should be actually put in prison; or that the act of taking into custody should be proved by the execution of a messenger. *Ibid.*—A bond of corroboration is struck at by the statute. *Ibid.*—*Nota.* This case went to appeal, and was afterwards compromised.

A disposition *omnium bonorum* by a person insolvent, but not under the description of act 1696, to a trustee for behoof of his creditors, named by a majority of themselves, valid. No. 193. *Andrew Hutchison* against *The Creditors of James Gibson*, Dec. 8. 1791.

See PROOF.

See RIGHT IN SECURITY.

BASTARD. A tack granted to a person born out of wedlock, excluding assignees, does not pass to the Crown's donatar. No. 84. *Falconer* against Hay, July 29. 1789.

BATTERY PENDENTE LITE. Act 1594, c. 219. This statute found not to be in desuetude. No. 63. *Balfour Fowler* against John Gillespie, Feb. 20. 1789.

Action on the statute sustained, so as to affect the creditors of a bankrupt party. No. 125. *John Annand* against John Ross, March 4. 1790.

BENEFICIUM COMPETENTIÆ. A person, after obtaining a *Cessio bonorum*, is not intitled to that privilege, although, if a creditor were to use diligence in such a way as to deprive the debtor of the necessaries of life, the Court would interpose. No. 42. *Pringle* against Neilson, Aug. 5. 1788.

BILL OF EXCHANGE—cannot be protested on the day of payment. No. 27. *Charles* against *Skirving* and others, July 2. 1788.

In a question between indorsers, it is enough for authorising a claim of recourse, that in intimating the dishonour, no improper delay had occurred. No. 132. *Robert*

Carrick against *Henry William Harper*, May 23. 1790.

A bill bearing a stipulation for interest from the date, sustained in a competition of creditors. The bill was holograph of the acceptor. No. 141. *John Sword* against *James Blair*, June 23. 1790.

Regular negotiation, how far required in accommodation-bills. No. 199. *Creditors of Macalpine and Company* against *Parsons and Govett*, Jan. 21. 1792.

See PRESCRIPTION.

See VIS ET METUS.

BONA FIDE CONSUMPTION—of Teinds. Whether a sum decerned for as the amount of bygone teind-duties be regarded as *fructus bona fide percepti*, either as to principal or annualments. No. 153. *John Harrison Oliphant* against *David Smyth*, Nov. 30. 1790.

BURGH ROYAL. A party building in consequence of a *jedge* and *warrant*, is bound to restore the subjects, as soon as the sums disbursed by him have been recovered out of the rents. No. 37. *Gregory* against *Burts*, July 19. 1788.

Non-resident freemen have no right to vote in the election of a deacon. No. 81. *Lamb* against *Hugh*, July 29. 1789.

Where no deacon has been elected at the usual time, the next election must be authorised by the magistrates. No. 83. *Donaldson* and others against the *Magistrates of Kinghorn*, July 29. 1789.

It is a disqualification from voting, that the party holds an office in the burgh at the will of the magistrates, No. 87. *Hugh* against *Main*, Aug. 6. 1789.

The daughter of a soldier found not intitled to authorise her husband to carry on a trade within burgh. No. 120. *The Corporation of Shoemakers of Perth* against *Elisabeth Macmartin*, Feb. 24. 1790.

The determination of the Court on 21st July 1786, respecting the fine or composition paid by intrant burghesses, adhered to by the Court. No. 133. *Reid* against *Incorporations of Mary's Chapel*, May 23. 1790.

Being a Peer's eldest son does not disqualify for a place in the council of a burgh. No. 165. *Alexander Birtwhistle* against *Lord Daer*, Feb. 23. 1791.

A person, in taking the oaths to government as an officer in a royal burgh, having annexed this qualification, "that he took them so far as was agreeable to the word of God," the Lords found, that he had not taken the oaths in the manner prescribed by law. No. 215. *Robert Banks* and others against *Henry Jeffrey* and others, June 6. 1792.

Disputed, but not decided, how far the acts of indemnity extend to those who wilfully refuse to take the oaths to government. No. 215. *Robert Banks* and others against *Henry Jeffrey* and others, June 6. 1792.

The official acts done by magistrates of royal burghs and others, within three months after their admittance into office, valid, though they have omitted or refused to take the oaths to government, *Ibid.*

CAUTIONER.

I N D E X.

C.

CAUTIONER. A bond, granted by two cautioners, having been given up and cancelled, upon an erroneous idea that the obligation of the debtor had been fully implemented; the Lords found, that the cautioners were nevertheless liable. No. 44. *Rigg and others against Paterson and Bell*, Nov. 15. 1788.

A cautionary obligation limited strictly to the terms in which it was expressed, though the meaning of the parties appeared to extend farther. No. 150. *The University of Glasgow against the Earl of Selkirk and others*, Nov. 18. 1790.

A cautionary obligation does not fall by the cautioner's death, but continues upon his heirs. No. 151. *The University of Glasgow against Sir William Miller and Mrs Janet Stirling*, Nov. 18. 1790.

One of two cautioners, paying on an assignment, intitled to be ranked on the estate of his co-cautioner for the whole sums due, to the effect of his recovering a rateable part of the debt. No. 206. *The Creditors of Sir Robert Maxwell against the Trustees of Patrick Heron*, Feb. 8. 1790.—*Nota*. This judgment appealed from, and the question is still undetermined.

See **MEDITATIO FUGÆ**.

See **PERSONAL AND TRANSMISSIBLE**.

See **RIGHT IN SECURITY**.

CHARGE TO ENTER HEIR. Special charge includes a general one *ejusdem generis*. No. 101. *Robert Bruce Henderson against Sir John Henderson*, Jan. 20. 1790.

CLAUSE. The expression "Lawful heirs-male," employed in certain parts of an entail, with the same meaning, as far as appeared, as that of "Heirs-male of the bodies" of the substitutes, used in other places of the deed, was nevertheless strictly interpreted in conformity to the words. No. 38. *Robert Hay against Miss Frances Hay*, July 21. 1788.

A clause, disposing all sums of money due by bond, does not comprehend those due by heritable bond. No. 61. *George Waddel against Robert Colt*, Feb. 13. 1789.

A destination being to the granter in life-rent only, and failing him by decease, to another person in fee, the latter understood to be dispositive or institute, and not an heir of entail. No. 167. *Robert Wellwood against Robert Wellwood and others*, Feb. 23. 1791.

A destination of fee to the granter himself, and to a *nomin tim* dispositive, does not carry it out of the person of the former. No. 168. *William Gordon against David Macculloch*, Feb. 23. 1791.

COLLATION. Heirs, whether *aliqui successuri*, or not, and whether *ab intestato* or *provisione hominis*, must collate, in order to claim any share of the moveable succession. No. 1. *John Hay Balfour against Miss Henrietta Scott*, Nov. 15. 1787. See Abstract of Appeal Cases.

See **HEIR AND EXECUTOR**.

See **SUCCESSION**.

See **TACK**.

See **TAILZIE**.

COLLEGE OF JUSTICE — found exempted from

the payment of poors money, and other taxations imposed by the Magistrates of Edinburgh. App. No. 1. *The Lord Provost and Magistrates of Edinburgh against The Faculty of Advocates, and the Society of Writers to the Signet, in behalf of the College of Justice*, Jan. 29. 1788.

COMPENSATION AND RETENTION. A vassal can not retain the feu-duties for damages occasioned by the working of a coal originally reserved by the superior, but afterwards sold by him to a third party. No. 154. *The Trustees of the Marchioness of Lathian against William Simpson*, Dec. 8. 1790.—Affirmed on appeal.

Goods in the hands of an artizan or manufacturer cannot be retained by him for any other debt than that of the expence of his manufacture. No. 163. *Creditors of Henry Harper against Andrew Faulds*, Jan. 27. 1791.

COMPETITION. A landlord, in virtue of his hypothec, preferable in a competition with the officers of the revenue, suing for recovery of a debt due to the Crown, No. 187. *James Ogilvie against Thomas Wingate*, June 29. 1791. See Abstract of Appeal Cases.

See **BANKRUPT**.

See **RIGHT IN SECURITY**.

CONDITION. A father who had granted a provision to his daughter, having, in an after deed, inserted the condition, that if she married a certain person the provision should be void; it was not sustained. No. 205. *Lydia Douglas and her Husband against the Trustees of Sir Charles Douglas*, Feb. 7. 1792.

D

DAMAGE AND INTEREST. Monopoly to the King's Printer. How far his patent extends to Bibles having commentaries annexed. No. 131. *His Majesty's Printer and Stationer against Bell and Bradgate and others*, May 22. 1790.

The highest offerer at a public roup, who failed to find caution according to the articles, by which the purchase devolved to the next, found liable for the surplus of price. No. 195. *Creditors of David Currie against William Hannay*, Dec. 13. 1791.

DEATHBED. Being in a market-place, though only for the purpose of visiting a friend, found sufficient proof of reconvalence. No. 11. *Taitzieour against Taitzieour*.—*Nota*. This case was carried to appeal, and afterwards compromised.

Not necessary to constitute deathbed, that the illness should, before the date of the settlement, be so violent as to confine the party to his bed, or even to his house. No. 12. *Black against Black*, Dec. 11. 1787.

E.

EXECUTION. In a complaint with regard to the election of a deacon in a royal burgh, it is only necessary to call the magistrates and counsellors of the burgh. No. 82. *Donaldson and others against the Magistrates of Kinghorn*, July 29. 1789.

A

I N D E X.

A summons executed without subscribing witnesses insufficient to interrupt the sexennial prescription of bills of exchange. No. 123. *James Baillie against James Doig, March 2. 1790.*

EXHIBITION. A party being examined as a haver, not competent to put a question relative to the existence of the debt claimed from him. No. 43. *John Yule against David Robertson, Nov. 13. 1788.*

F.

FACTOR. See **ANNUALRENT.**

FACTOR LOCO TUTORIS—may enter into a sub-mission. No. 208. *George Gordon Falconer, and his factor loco tutoris, against Katherine Thomson, Feb. 17. 1792.*

FIAR. A husband understood to be fiar of a subject provided to him *nomine dotis*, though the wife's heirs be called next after those of the marriage, the wife herself being named as a substitute. No. 101. *Robert Bruce Henderson against Sir John Henderson, Jan. 20. 1790.*

FIAR ABSOLUTE, LIMITED. A father bound by his marriage-articles to provide his lands to the heirs of the marriage, with a power of preferring any one of his sons to the eldest, and also of imposing limitations on his successor, may not appoint the lands to be sold, and the price to be divided among his children equally. No. 157. *James Farquhar Gordon and his Curators against the Trustees of John Gordon, Dec. 8. 1790.*

See **TAILZIE.**

FOREIGN. An heir is not bound to collate heritance in Scotland, in consequence of succeeding to executry funds of the predecessor's situated in England. No. 1. *John Hay-Balfour against Miss Henrietta Scott, Nov. 15. 1787.* See **ABSTRACT of Appeal Cases.**

An assignee under an English commission of bankruptcy, by obtaining decree, though in absence, against a debtor of the bankrupt, divests him of the *ius crediti*, and renders every posterior arrestment ineffectual. No. 8. *John Scott against James Leslie, Nov. 28. 1787.*

An alien may not sue in the courts of this country as a tutor-of-law or curator for an infant person resident in Scotland. No. 216. *James Miller and his Attornies against John Allen, June 8. 1792.*

Succession of moveable effects situated in a foreign country, whether testate or intestate, regulated by the *lex domicilii*. No. 185. *Rebecca Hog against Thomas Hog, June 7. 1791.*

Succession in moveables regulated by the *lex domicilii*. No. 192. *Jane Durie against Alexander Coutts, Nov. 30. 1791.*

An English certificate of conformity effectual in Scotland to protect the person of the bankrupt from diligence on English debts. No. 197. *Adam Watson against James Renton, Jan. 21. 1792.*

The price of goods furnished in Scotland to the order of a person in England, not held an English debt; but a bill payable in England being taken from the debtor, this renders it such. *Ibid.*

A bill being drawn in a foreign state on a person in Scotland, though not accepted, creates a debt, which is held not to be a foreign but a Scotch one. No. 198. *Robert Armour against John Campbell, Jan. 21. 1792.*

Foreign bills drawn on persons in England regulated by the English law. No. 199. *Creditors of Macalpine and Company against Parsons and Govett, Jan. 21. 1792.*

See **PROOF.**

FOREIGNER. How far a subject of the American States such. No. 210. *Anne Stewart against Sophia Hoome, May 18. 1792.*

FORUM COMPETENS. A native of Ireland having a military office in Scotland, without actual residence, not liable to the jurisdiction of the Scots courts. No. 62. *Forrest against Fungstone, Feb. 20. 1789.*

A marriage celebrated in England by two natives of Scotland not dissoluble in the Scots courts. In this case the criminal acts were not committed in Scotland. No. 59. *Brunsdone against Sir Thomas Wallace, Feb. 9. 1789.*

An English administrator living in Scotland may be sued here. No. 121. *Colin Morrison against James Ker, Feb. 25. 1790.*

FRAUD. An insolvent person having purchased goods on credit within three days preceding his bankruptcy, such purchase presumed in law to be fraudulent. No. 43. *Allan, Steuart, and Company against Creditors of James Stein, Dec. 4. 1788.* See **ABSTRACT of Appeal Cases.**

G.

GAME. No person, however qualified by law, is intitled to hunt on the grounds of another without his consent, though these lie open and uninclosed. No. 140. *E. of Breadalbane against Thomas Livingstone, June 16. 1790.*

See **ABSTRACT of APPEALS.**

GENERAL ASSIGNATION. See **CLAUSE.**

GLEBE. A minister cannot, in any case, grant a feu of his glebe. No. 179. *The Minister of Dunkeld against the Heritors, May 14. 1791.*

H.

HEIR and EXECUTOR. An heir cannot insist for collation, unless he be, at the same time, one of nearest in kin. No. 7. *Macaw against Macaw, Nov. 28. 1787.*

HEIR-PORCIONER. A country-house, with a garden and pleasure-grounds annexed to it, whither the proprietor used to retire for a day or two during the summer-season, cannot be set aside as a *Præcipuum* to the eldest heir-portioner. No. 217. *John Smith against Marion Wilson and others, June 12. 1792.*

HEIR CUM BENEFICIO. See **PRESCRIPTION.**

See **PROOF.**

HERITABLE and MOVEABLE. A legacy due to a person by her brother's heirs, whole estate was expressly burdened with it, found to be effectually conveyed by a deed in a testamentary form, which, besides bequeathing all goods and gear belonging to the testatrix, declared the disponee to be her sole heir, executrix, and assignee. No. 96. *Mrs Amelia Lamont against the Creditors of Lauchlan and Archibald Lamont, Dec. 4. 1789.*

See **HUSBAND and WIFE.**

An

I N D E X.

An estate, confifling partly of heritage and partly of moveables, being conveyed to trustees for behoof of heirs, legatees, and creditors, with power to sell the subjects and convert them into money—the interest of the heir held to be an heritable right, and not a *jus crediti* disposable by testament. No. 192. *Jane Durie against Alexander Coutts*, Nov. 30. 1791.

Investments in the government funds moveable. No. 196. *Rebecca Hog against Thomas Hog*, Dec. 23. 1791.

HUSBAND and WIFE. A decree of divorce in the Commissary court having been brought under reduction in the Court of Session by the wife, who was the defender in the original action, the Lords found her intitled to an aliment, and to the sums necessary for carrying on the action. No. 60. *De la Motte against Jardine*, Feb. 9. 1789.

A husband having left Scotland *oberatus*, his wife found liable to personal diligence, in the same manner as an unmarried woman, for debts contracted by her after his departure. No. 78. *Churnside against Currie*, July 11. 1789.

The debts of a trading company, though constituted by bonds bearing interest and secured on land, considered as moveable, in a question between the widow and representative of a deceased partner. No. 107. *Primrose Young against Charles Campbell*, Jan. 28. 1790.

No execution admitted against a wife's person for a debt *ex delicto* incurred during the marriage: nor is the husband liable, or the goods in communion; on that ground; but for the expences awarded to the pursuer the husband is liable, as *dominus litis*. No. 117. *Mrs Elisabeth Chalmers against Mrs Helen Douglas and her husband*, Feb. 19. 1790. See *Abstract of Appeal Cases*.

HYPOTHEC—does not take place on ships for repairs made in home-ports. No. 40. *Archibald Hamilton against John Wood and others*, July 29. 1788.

See *COMPETITION*.

I.

IMBECILLITY. A deed executed by a man in his ninety-fifth year, while enfeebled both in body and mind, sustained, although it appeared from the evidence of witnesses, that the testator was not aware of the consequences of the deed. No. 89. *Mrs Helen Scott against Archibald and Jean Terson*, Nov. 17. 1789. See *Abstract of Appeal Cases*.

IMPLIED ASSIGNATION. See *LEGITIM*.

IMPLIED CONDITION. A provision to a grandchild, made payable on his marriage, or attaining a certain age, lapses by his dying before that period unmarried. No. 47. *Samuel Omev against Janet MacLarty*, Nov. 19. 1788.

IMPLIED OBLIGATION. Coal having been reserved in a feu of lands, whether surface-damages be due to the feuer, though not stipulated for. No. 46. *Duke of Argyll and his Tacksman against Feuers of Sheardale*, Nov. 21. 1788.

INFESTMENT. See *TERCE*.

INSURANCE. See *PERICULUM*.

IRRITANCY—of a feu-right *ob non solutum canonem* sustained under the statute of 1557. c. 246. No. 221. *John Ballenden against the D. of Argyll*, July 6. 1792.

See *SALE*.

See *TAILZIE*.

JURISDICTION—*Nobile officium*. In the appointment of a factor *loco tutoris*, the strictest attention required to the established regulations. No. 16. *Mary Cowan and Andrew Cowan her father, Petitioners*, Jan. 19. 1788.

The trustees in a deed of settlement having failed, the Court would not interpose by naming another trustee. No. 91. *James Anne Macdual against Archibald Macdual*, Nov. 20. 1789.

The Justices of the Peace have no jurisdiction in ordinary questions of debt. No. 138. *James Robertson against John Shedden*, June 15. 1790.

Horning competent to pass on the extracted decrees of the magistrates of boroughs of barony or of regality, or on protests and other writings registered in their court-books, No. 152. *Magistrates of Paisley and John Adam*, Nov. 30. 1790.

Questions respecting the right of the electors of parish-ministers under act 1690 competent in the civil courts. No. 194. *James Dunlop and others against Thomas Muir and others*, Dec. 9. 1791.

See *MEMBER OF PARLIAMENT*.

See *POINDING*.

See *PUBLIC POLICE*.

K.

KING. See *COMPETITION*.

L.

LEGAL DILIGENCE. A pardon having been granted to a criminal sentenced to transportation, on condition of his enacting himself to banishment after being set at liberty; personal diligence at the instance of creditors not thereby precluded. No. 124. *Ebenezer Gardner against Thomas Hall*, Mar. 3. 1790.

LEGITIM. One or more of the children in familia having renounced their legitim, their shares fall to those who have not renounced. No. 186. *Rebecca Hog against Thomas Hog*, June 7. 1791.

See *FOREIGN*.

LIFERENT. A liferenter not intitled to cut growing woods on the lands liferented, tho' planted by himself, and fit for the axe, unless they be such as are in use to be cut in a certain yearly progression. No. 64. *Gray against Seton*, Feb. 24. 1789.

M.

MANSE. Presbyteries, though they may authorise the repairing or rebuilding of manse, have no power to enlarge them. No. 39. *Robertson against the E. of Roseberry*, July 28. 1788.

MEDITATIO FUGÆ. Damages found due for an irregular use of a *meditatione fugæ* warrant. No. 99. *Patrick Laing against James Watson and John Mollison*, Dec. 20. 1789. See *Abstract of Appeal Cases*.

A cautioner *de judicio fisci* may be called to fulfil his obligation at any time before the

I N D E X.

the period allowed for extracting the decree against the debtor. No. 142. *Charles and James Brown and Company against William Wilson.*

MEMBER OF PARLIAMENT. The trifling pecuniary value of an estate giving a freehold qualification, is not *per se* a sufficient proof of nominality. No. 20. *Lindsay against Drysdale*, March 6. 1783.

The wadset of a fee of a superiority burdened with a right of liferent in favour of another person, does not give a right to vote as a freeholder. No. 66. *Sir William Forbes and others against Blair*, March 6. 1789.

The small value of the feudal right in a pecuniary view, insufficient to prove that the freehold qualification founded on it was nominal and fictitious. Neither is it competent, by interrogatories separate and distinct from the oath of trust and possession, to prove the objection of nominality. No. 67. *Sir William Forbes and others against Sir James Macpherson and others*, March 6. 1789. This case carried to appeal, and the judgement of the Court on the last point reversed. See Abstract of Appeal Cases.

A freeholder's having withdrawn from the meeting before the trust-oath was put, but when he knew it was to be put, found equivalent to a refusal to swear, unless he could give a sufficient reason for his absence. No. 102. *Sir William Dunbar against John Davidson*, Jan. 20. 1790.

Competent to try a party's right to a peerage, when stated as an objection to his continuing on the roll of freeholders. No. 107. *Sir William Dunbar and others against Sir James Sinclair*, Feb. 2. 1790.

After the preses and clerk have been chosen, the trust oath may be put to any freeholder present at the meeting, though taking no share in the proceedings. No. 113. *R. B. E. Macleod and David Urquhart against Hugh Rose*, Feb. 12. 1790.

In questions respecting freehold-claims, an extract of a charter from the records in Chancery is not admitted. No. 118. *William Nisbet against Charles Hope*, Feb. 23. 1790.

Debated, but not decided, whether a husband could be inrolled in virtue of his wife's investment, in a right of superiority, *Ibid.*

In transcribing an instrument of feisin into the record, certain lands, though specified in the precept of feisin inserted in the introductory part of the instrument, were omitted in the clause where the notary attests that delivery was given. Found, that, with regard to the omitted lands, the feisin had not been recorded in terms of the statute, so as to authorise a claim for inrolment as a freeholder. No. 119. *Charles Gray against Charles Hope*, Feb. 23. 1790.

Long use of paying the land tax, held as sufficient presumptive evidence of the valued rent. No. 122. *The Hon. Henry Erskine against the Hon. John Hope*, Feb. 23. 1790.

An instrument of feisin, not marked in the minute-book, nor engrossed in the record till within twelve months of the inrolment, sustained, in respect of the practice in the county in which the claim for inrolment was made. No. 126. *Sir William Dunbar*

and others against George Sutherland, March 10. 1790.

A complaint to the Court of Session must be served against all those who offered objections in the freeholders court. No. 128. *Joseph Williamson against John Smith*, May 15. 1790.

A claim for inrolment by a liferenter, ought to specify the nature of his right. No. 129. *Alexander Murray against Alexander Muir-Mackenzie*, May 16. 1790.

The trust-oath of 7th Geo. II. is not the only criterion of nominality. No. 139. *Sir William Forbes and others against William Tait and others*, June 15. 1790.

Other means than the trust-oath, for ascertaining the objection of nominal and fictitious, precluded by the lapse of four months after inrolment. No. 155. *Mark Pringle against Freeholders of Roxburghshire*, Dec. 8. 1790. See Abstract of Appeal Cases.

A superior of lands obtaining a charter of resignation in favour of another person in liferent and of himself in fee, may, nevertheless, claim inrolment as a freeholder, in virtue of his former investitures. No. 156. *The Hon. James Erskine against Robert Graham*, Dec. 8. 1790.

The objection, that two parcels of land, separately valued, had been erroneously thrown together, is not admitted, after an acquiescence of many years. No. 159. *Sir Alexander Campbell against Peter Spiers*, Dec. 14. 1790.

The executing of a trust deed, containing procuratory and precept, does not disqualify the granter from voting as a freeholder. *Ibid.* The possession of trustees, held to be the possession of an apparent heir for whose behoof they acted, so as to entitle him to vote as a freeholder. *Ibid.*

The act 1696. c. 25. respecting trusts, is not applicable to questions with regard to freehold qualifications. No. 160. *Hay Ferrier against Morehead*, Dec. 22. 1790.

No deduction to be made from a valuation on account of superior duties payable to a donatary of the Crown. No. 166. *Freeholders of Orkney against John Trail*, Feb. 23. 1791.

A decree of valuation *ex facie* regular, though liable to exceptions, is to be sustained until set aside by reduction. *Ibid.*

A complaint received for not expunging the name of a freeholder, though no precise decision had been given in the freeholders court. No. 172. *Sir Alexander Campbell against David Ballingall*, March 3. 1791.

An application for being continued on the roll, in virtue of a restricted qualification, equivalent to a claim for being inrolled, so as to authorise a summary complaint. No. 173. *George Dempster and others against Charles Lvel*, March 3. 1791.

Act 16th Geo. II. found to be competent, after the four calendar months, to try the objection of nominal and fictitious. No. 182. *Alexander Milne against Freeholders of Aberdeenshire*, May 31. 1791. See Abstract of Appeal Cases.

Elders sons of peers, not entitled to be inrolled as freeholders. App. No. 3. *Hon. Keith Stewart against Lord Daer*,

MINISTER.

I N D E X.

MINISTER. See GLEBE. MANSE. PERSONAL AND TRANSMISSIBLE.

MOVEABLES. Delivery *brevi manu*. Civil possession not attained by indorsement of bills of lading. No. 80. *John Young against the Trustee for James Stein's creditors*, July 23. 1789.

Same point. No. 48. *Allan, Stewart, and Company, against Creditors of James Stein*, Dec. 4. 1788.

MUTUAL CONTRACT. Upon a master's bankruptcy, the servant's claim for wages is subject to deduction of what was otherwise earned by him. No. 148. *Puncheon against the Trustee for the Creditors of Haig and Company*, Nov. 17. 1790.

N

NAUTÆ CAUPONES ET STABULARII. See PERICULUM.

P

PACTUM ILLICITUM. How far a Scotsman carrying on trade abroad, has action in this country for the price of contraband goods. No. 53. *Trustees of Henry Greig against John Davidson*, Jan. 13. 1789.

It is unlawful in the magistrates of a royal burgh to stipulate an indemnification, from prisoners, in case of their escape. No. 71. *Shoolbred and others against Osborne*, June 18. 1789.

Action for the price of contraband goods denied to a Scotman carrying on trade abroad, he having had some participation in the smuggling adventure. No. 112. *Attorney of James Cantley against Thomas Robertson*, Feb. 11. 1790.

Same question. No. 144. *The Attorney of Young and Company against Alexander Imlach*, July 7. 1790.

It is not unlawful, to stipulate an extraordinary rate of interest, where an unusual risk is run by the lender. No. 143. *William Glen against the Creditors of Macalpine*, June 30. 1790.

See USURY.

PART AND PERTINENT. The right of trout-fishing understood as conveyed under the description of Part and Pertinent; but may be expressly reserved from the grant, or transferred to a third party. No. 5. *Robert Carmichael and others against Sir James Colquhoun*, Nov. 20. 1787.

PASSIVE TITLE. *Gestio pro herede*. An heir at law, who, as such, had concurred with a gratuitous donee in heritage, in granting a discharge of an heritable debt falling to the heir, but from enjoying which he was precluded by the donee's claims of relief from the ancestor's debts, found not thereby to incur the passive title of *gestio pro herede*. No. 56. *Hugh Gordon against Alexander Clerk*, Jan. 27. 1789. See Abstract of Appeal Cases.

Where the intromissions of the heir have been with a view of preserving the effects, no passive title is incurred. No. 177. *The Creditors of Blairs against David Blair*, May 13. 1791.

See SOLIDUM ET PRO RATA.

PATRONAGE. One of the patrons in a united parish, may present on every vacancy, if no presentation be offered by the other patron. No. 18. *Grant against the Duke of Gordon*, Feb. 7. 1788.

PENALTY. A creditor having prevailed in a challenge of his ground of debt, at the instance of a third party, who was, however, found not liable in expenses,—entitled to recur against the debtor upon the stipulated penalty, for payment of such expenses. No. 23. *William Allard against James Morrison and Andrew Murison*, June 19. 1788.

PERICULUM. The price of flax-seed due, though it appeared to be insufficient, no objection having been offered till after it was sown. No. 19. *Baird against Aitken and others*, Feb. 13. 1788.

A vessel warranted to sail with convoy, instead of proceeding to the place of rendezvous, remained in a harbour within reach of the convoy's signals, to which she paid obedience, but was by accident prevented from joining it for several days after sailing. Long after the junction, the ship being captured, the underwriters, from failure of the warranty, were found free. No. 49. *Walter Monteath against David Gresse and others*, Dec. 10. 1788.

The clause in a policy, "with leave to call at a port," how understood. No. 147. *Archibald Robertson against John Laird*, Nov. 16. 1790.

A common carrier between one place and another, having undertaken the conveyance of goods intended for a place at a greater distance, found not liable for the loss of the goods, he having delivered them, at the end of his journey, to another common carrier, for the purpose of their being conveyed to the place of their destination. No. 161. *James Dennison against William Harkness*, Jan. 15. 1791.

PERSONAL OBJECTION. Bonds having been issued in a form calculated for ready currency, and apparently free from exception; exceptio non numerata pecunie, though good against those who first obtained them, not competent against their assignees. No. 188. *York-buildings Company against Martin, Stone, and Foote*, Nov. 15. 1791.

PERSONAL AND REAL. Sums with the payment of which a conveyance of lands was burdened, found to be preferably secured, in a question with the creditors of the disponent, whose right, being a qualified one, could only be taken *tantum et tale* as it stood in him. No. 95. *Amelia Lamont against the Creditors of Lauchlan and Archibald Lamont*, Dec. 4. 1789.

An entail not followed with infestment, not effectual, though recorded, against the real diligence of the creditors of the institute, he being also heir of line. No. 200. *John Russell, Hugh Ross, and others, against Creditors of Hugh Ross of Kerse*, Jan. 31. 1792.

The terce is not excluded by the husband's debts, though these be declared burdens on the

INDEX.

the heir, and the declaration appointed to be ingrossed in the infestments. No. 210. *Ann Stewart against Sophia Hoome*, May 18. 1792.

See WARRANTICE.

PERSONAL AND TRANSMISSIBLE. Annuities due to the widow of a Scots clergyman, in virtue of the act 17th George II. c. 11. not assignable before the term of payment. No. 180. *Jean Mackenzie against William Morison*, May 19. 1791.

It is optional to a substitute heir of entail, to avail himself of an irritancy incurred by the heir in possession, so that it is not an adjudicable faculty, or such as devolves any right to the husband of a female substitute, under the *jus mariti*. No. 57. *Trustees of Alexander Wedderburn against Mrs Margaret Colville*, Jan. 29. 1789.

See APPRENTICE.

See CAUTIONER.

POINDING. The property of a third party being poinded, may be reclaimed without the necessity of a reduction. No. 92. *George Harkies against Wells and Cuming*, Nov. 24. 1789.

See JURISDICTION.

POLICY OF INSURANCE. See PERICULUM.

PRESCRIPTION. Where the triennial prescription had not run at the death of the ancestor, the oath of the heir, though served *cum beneficio inventarii*, may be resorted to, to prove *resisting owing*. No. 55. *Syme against Douglas, Heron, and Company*, Jan. 15. 1789.

The minority of one of many nearest in kin, only preserves from prescription that part of the debt which, in the distribution of the estate, would have belonged to the minor. No. 158. *Elisabeth Cuming against the York-buildings Company*, Dec. 8. 1790.

The possession of an apparent heir dying unentered, reckoned in the period of prescription, the ancestor having been duly infest. No. 162. *John Cautcheon against Peter Ramsay*, Jan. 22. 1791.

The sexennial prescription of bills of exchange does not affect the claim of recourse competent to the acceptor of a bill against the drawer. No. 211. *Henry Ralston against John Lamont*, May 23. 1792.

Relative writings during the six years do not interrupt the sexennial prescription of bills of exchange; but the slightest acknowledgement of the debt, after the six years, will be sufficient for that purpose. No. 212. *James Russell against James Fairie*, May 23. 1792.

Years of minority of substitute heirs of entail not to be deducted. No. 201. *Creditors of Auchindachy against Isaac Grant*, Jan. 31. 1792.

The Scottish prescription not pleadable by debtors domiciled in England. No. 207. *The York-buildings Company against Richard Cheswell and others*, Feb. 14. 1792.

See ALIMENT.

See EXECUTION.

See PROOF.

See SERVICE.

PRESUMPTION. Payment of a bill presumed from circumstances, though the sexennial prescription had not elapsed. No. 21. *James*

Russel and others against Patrick Frazer, June 13. 1788.

An annuity by bond, granted for a price, being payable at Whitsunday and Martinmas for the preceding half year; no part of it due for such half year, if the annuitant do not survive the respective terms. No. 73. *Earl of Dalhousie against Samuel Gilmour*, June 19. 1789.

PRISONER.—Act 1696. How far a person imprisoned for non-payment of a fine to the private party, and to the public prosecutor, is intitled to the benefit of the Act of Grace. No. 10. *David Clark against Alexander Johnston and Procurator Fiscal of Mid Lothian*, Dec. 7. 1787.

Act of federunt 1671. The magistrates of a royal burgh found liable for the debt of a person who had obtained a *Cessio honorum*, he having been released before the decree in his favour could be regularly extracted. No. 30. *Wilson against the Magistrates of Edinburgh*, July 8. 1788.

Jail fees not due by persons imprisoned on a criminal accusation. No. 72. *John Thomson against the Keeper of the Tolbooth of Edinburgh*, June 18. 1788.

A person to whom a *Cessio honorum* had been refused, admitted to the benefit of the act of Grace. No. 134. *Robert Aitken against William Gray*, May 27. 1790.

Magistrates having delayed, for twenty-four hours, to incarcerate a debtor, and having afterwards, according to the custom of the borough, allowed him the privilege of open jail, as it was termed, found liable for the debt. No. 136. *Mrs Nancy Shortcill against Provost and Magistrates of the Burgh of Annan*, June 8. 1790.

A person imprisoned for a claim of damages, though *ex delicto*, intitled to the benefit of a *Cessi*, if the bankruptcy arose from other causes. No. 174. *Walter Macdonald against Catharine Moliee*, March 5. 1791.

See PACTUM ILLICITUM.

PRIVILEGED DEBT. Wages, or a yearly salary, to the overleer of an extensive distillery, not such. No. 57. *Ridley against Haig's Creditors*, Feb. 2. 1789.

PROCESS. A decree having been extracted, before expences, though awarded, were modified, and without any reservation of them being made, not competent afterwards to demand decerniture for them; nor is there any distinction in the case of costs, by 16th Geo. II. cap. 11. No. 90. *Town Council of Rothsay against Macneil*, Nov. 17. 1789.

A decree obtained in the Court of Session, in absence of the defender, who was personally cited, held *pro re judicata*, no objection having been stirred during his life. No. 79. *Blair against the Creditors of Kinloch*, July 23. 1789.

But in a process before the Court of Session, where the citation has been performed merely at the defender's dwelling-house, the decree is not held *pro re judicata*. No. 108. *Colt Macdonald against the Common Agent in the sale of Kinloch*, Feb. 4. 1790.

Even

INDEX.

Even in a process before an inferior court, in a case where the defender was not personally cited, a decree in absence, if not challenged by the defender himself, when he had a full opportunity of doing so, held *pro re judicata*, and this, whether the action has been brought in the Court of Session, or in any inferior judicature, where the regulations of 1672 and 1693 do not apply. No. 109. *The Trustee of Donald Sutherland against the Honourable Mrs Clementina Lockhart and others*, Feb. 4. 1790.

Oath on reference competent, after the adducing of parole proof. No. 204. *Margaret Dalzel against John Richmond*, Feb. 4. 1792.

See COMPETITION.

See PRESCRIPTION.

PROOF. See IMBECILLITY.

PROVISION TO HEIRS AND CHILDREN—do not give a *jus crediti* where they cannot, in any event, be exigible during the father's lifetime. No. 1. *Younger Children of MacTavish against his Creditors*, Nov. 15. 1787.

A destination of lands in a marriage-contract, to "the heirs and bairns of a marriage," gives the right to the heir or eldest son of the marriage. No. 45. *Jacobina Reid, against Katharine, &c. Woods*, Nov. 18. 1788. No. 69. *Fairservice against Whyte*, June 17. 1789.

The issue of a child of a marriage, upon her pre-decease, intitled to her share. No. 75. *Wood against Aitchison*, June 26. 1789.

A provision by marriage-contract good against creditors, though not payable till after the father's death, interest being due from the periods of the childrens majority or marriage. No. 203. *Creditors of Kenneth Mackenzie against his Children*, Feb. 2. 1792. *Nota*. This decision appealed from, and still depending.

See IMPLIED CONDITION.

PROOF. Other proof of a bankrupt's imprisonment in terms of the statute 1696, beside the messenger's execution, admissible. No. 54. *James Richmond and others against Trustees of Charles Dalrymple*, Jan. 14. 1789. No. 170. *The Creditors of Neil Mackellar against Donald Macmath*, March 1. 1794.

Parole proof of the payment of money inadmissible. No. 94. *Creditors of Alexander Gray against Robert Grant*, Dec. 1. 1789.

See IMBECILLITY.

PUBLIC BURDENS. Burgesses or traders, and not private inhabitants of towns, liable to the burden of the local quartering of soldiers. No. 58. *Earl of Wemyss and others against Magistrates of Canongate*, Feb. 6. 1789.

PUBLIC OFFICER. A magistrate found liable in damages, for an irregular interposition of a *meditatio fugæ* warrant, although he appeared to have acted *bona fide*, and without any intention to injure. No. 99. *Patrick Laing against James Watson and John Mollison*, Dec. 20. 1790.

PUBLIC POLICE. The act 1698, c. 8. extends even to those suburbs of the town of Edinburgh over which the Dean of Guild has no jurisdiction, but the Sheriff of the County. No. 74. *Procurator-Fiscal of the County of*

Edinburgh against Dott and Paterson, June 20. 1789.

RANKING AND SALE. No diminution of the judicial rental sufficient to annul a judicial sale. No. 26. *Hugh Inglis and others against George Dempster*, June 27. 1788.

A decree of sale at the suit of an apparent heir, is only held as an adjudication for the creditors of the ancestor, where it is within year and day of the first effectual adjudication. No. 189. *George Haldane and others against Charleton Palmer*, Nov. 15. 1791.

REPARATION. See MUTUAL CONTRACT.

See PUBLIC OFFICER.

RES INTER ALIOS. See POINDING.

RES JUDICATA. An adjudication having been sustained as a security for the principal sum and interest, in a question with the debtor, though informal and inept, was found to be effectual to that extent against those creditors whose debts were due prior to the decree, but not as to creditors in debts posterior to it. No. 85. *Ker's Trustees against the Creditors of Mainfnull*, July 30. 1789.

See PROCESS.

RIGHT IN SECURITY. An heritable bond, granted in security of sums to be paid on a cash-account, ineffectual, except as to payments made prior to the infestment. No. 14. *George Pickering against Smith, Wright, and Gray*, Jan. 16. 1788.

An heritable security, for sums paid posterior to its date, but prior to the delivery of it to the creditor, valid. No. 86. *Creditors of Sir James Dunbar against Sir George Abercromby*, July 30. 1789.

An heritable security for a cash-credit with a banking-house set aside. No. 88. *Creditors of James Stein against Newnham, Everett, and Company*, Nov. 14. 1789.

A mercantile house, which had advanced money for a correspondent, and was possessed of bills indorsed and transmitted by him, allowed, upon sequestration being awarded against him, to rank for their full debt, without deduction of the payment of the bills received after the sequestration. No. 135. *Trustees for the Creditors of Mess. Fall and Company against Sir William Forbes, James Hunter, and Company, and Sir John Anstruther*, May 27. 1790.

How far bills remitted and discounted prior to the bankruptcy of the remitter, though not payable till afterwards, are to be deemed collateral securities. No. 146. *Creditors of James Stein against Assignees to the estate of Sandeman and Graham*, Nov. 16. 1790.

An heritable security in relief granted to a cautioner in a cash-credit, good only as to money advanced prior to the infestment. No. 171. *Creditors of John Brough against the Heirs of Robert Selby*, March 2. 1791.

See BANKRUPT.

See SALE.

SALE. It being stipulated, that if the highest offerer at the sale should not give security within a stated time, the purchase should devolve on the immediately preceding offerer; and intimation of the devolution having been given to the second offerer accordingly, he was preferred to the purchase, though the delay

I N D E X.

- Delay in giving security had arisen from no culpable act of the highest offerer. No. 35. *Hanray against Stotterd and others*, July 15. 1788.
- Lands disposed in security, with a power of selling, the creditor may proceed, in the form prescribed by the agreement, without any judicial authority. No. 137. *Robert Brown against Andrew Storie*, June 11. 1790.
- A sale of moveables does not transfer the property unless followed with actual possession. *Thomas Kinneil against Alexander Menzies*. No. 149. Nov. 18. 1790.
- SERVICE AND CONFIRMATION. Adjudication by a general disponee, without confirmation, ineffectual, although preceded by a decree *in foro*. No. 93. *Anne Arbuthnot against Archibald Cockburn*, Nov. 27. 1789.
- SERVICE OF HEIRS. A title made up by an heir, in virtue of a precept of *Clare constat*, is good, in the case of a tailzied succession, as well as in that marked out by the law itself; but the character of the heir must be distinguished with the same accuracy in the precept as in a special service: and therefore, where lands had been destined to *the heirs of a marriage*, an infeftment given by a superior in favour of the only son, in the character of *nearest and lawful heir* to his father, was found inept and void. No. 45. *Reid against Wood and others*, Nov. 18. 1788. No. 70. *Fairservice against White*, June 17. 1789.
- A general service expedes for giving right to lands in which the ancestor was infeft *a non domino*, is not rendered ineffectual by the subsequent acquisition of the property in consequence of the positive prescription. No. 97. *Elisabeth and Jean Sinclair against Robert Sinclair*, Dec. 13. 1789.
- SERVITUDE. A negative servitude granted by written contract, effectual against a singular successor, without registration, or any previous visible exercise of the right. No. 202. *Robert Gray against Walter Ferguson*, Jan. 31. 1792.
- SOCIETY. The heritors and kirk-session of a parish, in respect to a charitable fund under their administration, intitled to sue and defend as a corporate body. No. 190. *The Minister, Heritors, and Kirk-Session of Dalry against John Newal and others*, Nov. 17. 1791.
- See APPRENTICE.
- SOLIDUM ET PRO RATA. Tutors having neglected to make up an inventory, liable *singuli in solidum*. No. 32. *Janet Henderson against Archibald Duff and James Henderson*, July 10. 1788.
- The executors of a tenant not liable for the rents of those years of which the heir was intitled to reap the crop. No. 176. *The Duke of Gordon against John Leslie and others*, March 8. 1791.
- The consent of a tutor named *sine quo non* is necessary to every act of administration, though he cannot do any thing in opposition to the other tutors. No. 184. *Susanna Vere against the Earl of Hyndford and others*, June 1. 1791.
- SUBSTITUTE AND CONDITIONAL INSTITUTE. Substitution of heirs may take place in moveables, but not to be admitted without express words. No. 213. *George Brown against Robert Coventry*, June 2. 1792.
- SUCCESSION—in moveable effects—regulated by the *lex rei sitæ*, and in those which are at sea, by the law of the country whither they were destined by the proprietor. No. 25. *Bruces against Bruce*, June 25. 1788. See ABSTRACT OF APPEAL CASES.
- See CLAUSE.
- See FOREIGN.
- SUPERIOR AND VASSAL. See COMPENSATION AND RETENTION.
- TACK. Lands let for nineteen years, not to be sublet without a special stipulation. No. 17. *Alison against Proudfoot*, Jan. 22. 1788.
- See BASTARD.
- Where a tenant has been taken bound to give up part of his farm on receiving an *equivalent deduction* out of the *rent*, he is intitled to insist for the full value of the lands at the time of the surrender. No. 41. *Sharp against Burt*, July 31. 1788.
- Subsetting not permitted in a lease for nineteen years, when the power of so doing is not specially granted. No. 175. *Earl of Peterborough against Milne*, March 8. 1791.
- TAILZIE. A prohibition to sell does not hinder an alteration of the course of succession. No. 77. *Charles Stewart against Miss Sophia Hoome*, July 8. 1789.
- A condition in an entail, that the heirs should denude, in the event of their succeeding to a particular estate, applied, in a question with the next heir, to the case of an heir already proprietor of that estate when the tailzied succession opened to him, and effectual, though not fenced with prohibitory, irritant, and resolute clauses. No. 101. *Robert Bruce Henderson against Sir John Henderson*, Jan. 20. 1790.
- See CLAUSE.
- See PRESCRIPTION.
- See REAL AND PERSONAL.
- TEIND. The vicarage of lint due, if in use to be paid out of the farm. No. 3. *Williamson against Lunan*, Nov. 15. 1787.
- Those bishops tithes alone are exempted from the burden of augmentations, which belonged to that rank of the clergy at the Reformation. No. 36. *Officers of State against Christie*, July 16. 1788.
- In localling a minister's stipend, those possessing the teinds of their lands by *tacit relocation* from the Crown, as coming in the place of a bishop, are considered as having an heritable right. No. 51. *Heritors of Kirkliston against Gibson-Wright*, Dec. 17. 1788.
- The grant of a patronage, *cum decimis, rectoriis, et vicariis*, before the year 1690, gives a right to the titularity of the tithes. No. 214. *Thomas Elliott Ogilvie against Sir John Scott*, June 6. 1792.
- TERCE—not excluded by a deed of disposition from the husband, followed with actual possession of the lands, but not with infeftment. No. 31. *Macculloch against Maitland*, July 10. 1788.

I N D E X.

- A widow's claim to her terce sustained when the husband's infestment had been reduced on nullities. No. 103. *Mrs Elisabeth Rose against Mrs Anne Fraser*, Jan. 26. 1790.
- Terce due out of lands situated within the royalty of a burgh, and contained in the charter of erection, if held, not in burgage, but in feu of the town. No. 104. *Mrs Elisabeth Rose against Mrs Anne Fraser*, Jan. 26. 1790.
- Act 1681, c. 10. The operation of this statute excluded by any deed which shews an intention of not with-holding the terce. No. 191. *Anne Elisabeth Jankouska*, alias *Grieve*, against *Andrew Anderson and others*, Nov. 29. 1791.
- See PERSONAL AND REAL.
- TESTAMENT. A deed settling on the grantee the granter's whole effects and funds, and in the event of non-acceptance, discharging the grantee of a debt due to the granter by him, found to be in both parts testamentary and revocable. No. 65. *Trustees of Janet Dougall against John Dougall*, Feb. 25. 1789.
- THIRLAGE. No multure can be demanded for grain due to the superior of the alstricted lands, although he should accept a pecuniary commutation. No. 22. *Lord Macleod against Rofs and Munro*, June 17. 1788.
- Thirlage of *inveſta et illata* does not extend to meal or flour imported by the inhabitants, and ground before it is purchased. No. 24. *Magistrates and Town Council of Haddington against the Bakers of that town*, June 19. 1788.
- A right of thirlage is not, in every case, done away by the union of the dominant and servient tenements in the person of the same proprietor. No. 68. *Smyth against Young's Trustees*, June 14. 1789.
- TITLE TO PURSUE. An action sustained at the instance of parties who had united themselves into a society for religious worship. No. 181. *David Allan and others against James Macrae*, May 25. 1791.
- TRUST. See MEMBER OF PARLIAMENT.
- TUTOR AND PUPIL. A tutor obtaining in his own name, a lease of lands formerly held by the pupils, accountable to them for the profits. No. 76. *Wilsons against Wilson*, June 26. 1789.
- TUTOR. See SOLIDUM ET PRO RATA.
- USURY. A bill for the amount of annual-rents, in which were included, accumulations of interest made half-yearly, set aside, action being sustained for principal and annual-rents, as payable by the original obligation. No. 114. *John Dun against William Colhoun*, Feb. 12. 1790.
- See PACTUM ILLICITUM.
- VIS ET METUS. Exception of violence, arising from concussion, under the colour of law, good against the onerous indorsee of a bill of exchange. No. 9. *Wightman against Graham*, Dec. 6. 1787.
- WADSET. Feu-duties may be the subject of a proper wadset, even where they are due by the wadsetter himself. No. 111. *The Trustees of Fraser of Lovat against Alexander Chisholm*, Feb. 9. 1790.
- WARRANTICE. Doubted, but not precisely determined, how far a claim of real warrantice could be effectual against a singular successor, if it was not specified in the warrantor's infestment. No. 13. *Balfour against Moncrieff*, Jan. 14. 1788.
- WITNESS. The evidence of the mother and sister of a pursuer in a declarator of marriage inadmissible. No. 145. *Margaret Dalziel against John Richmond*, July 10. 1790.
- WRIT. A witness being designed in a deed, by his familiar appellation, and subscribing in his proper one, this vacates the deed. No. 4. *Archibalds against Marshall*, Nov. 17. 1787.
- Act 1681. An error in the Christian name of a subscribing witness, otherwise properly designed in the deed, and in such a manner as sufficiently to distinguish him, held a nullity under the statute. No. 6. *Douglas, Heron, and Company, against Mrs Helen Clerk*, Nov. 28. 1787.
- A missive letter of tack sustained, though not holograph, the subscription not being denied, and possession having followed. No. 33. *Colquhoun Grant against the Representatives of James Richardson*, July 10. 1788.
- An unstamped writing may be stamped, even after an adjudication has been deduced upon it. No. 96. *Amelia Lamont against the Creditors of Lauchlan and Archibald Lamont* Dec. 4. 1789.
- An error in the name of one of the witnesses inserted in the testing clause of a bond, may be corrected by the person entrusted with the filling up of the testing clause, at any time before its being put on record, or being exhibited judicially. No. 115. *The Bank of Scotland against the Creditors of Daniel Telfer*, Feb. 17. 1790.
- Act 1681. cap. 5. The acknowledgement of subscription, not sufficient to supply the want of any of the statutory solemnities of deeds. No. 130. *Malcolm Macfarlane against John Grieve*, May 22. 1790.
- In deeds executed by persons who are blind, with the assistance of notaries, it is necessary, that, at the time of executing, they be read over in the hearing of the granters, before the witnesses. No. 219. *Trustees of George Rofs against Sarah Aglianby*, July 3. 1792. See Abstract of Appeal Cases.
- See BILL OF EXCHANGE.



